

COPY

(27.572)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 290.

ANNA LANG, AS ADMINISTRATRIX, &c., OF OSCAR G.
LANG, DECEASED, PETITIONER,

v/s.

NEW YORK CENTRAL RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF NEW YORK.

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a Certified Copy.

STATE OF NEW YORK:

Court of Appeals.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits
of Oscar C. Lang, Deceased, Respondent,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

Record on Appeal.

Julius A. Schreiber, Attorney for Respondent, 104 Erie Co. Bank
Building, Buffalo, N. Y.

Locke, Babcock, Spratt & Hollister, Attorneys for Appellant, 814
Fidelity Bldg., Buffalo, N. Y.

b STATE OF NEW YORK,
Court of Appeals,
Clerk's Office:

I, R. M. Barber, Clerk of the Court of Appeals of the State of New
York, do hereby certify that the annexed printed record in the case
of Anna E. Lang, as Administratrix of the goods, chattels and credits
of Oscar C. Lang, deceased, Respondent, against The New York Central
Railroad Company, Appellant, is a copy of the printed record
therein, which was submitted on the argument of said case before
the Court of Appeals on December 4, 1919, and that the same is a
true and correct copy thereof.

In witness whereof, I have hereunto set my hand and affixed the
seal of said Court of Appeals, at the City of Albany, this tenth day
of February A. D., 1920.

[Seal of the State of New York Court of Appeals.]

R. M. BARBER,
Clerk.

1 STATE OF NEW YORK:

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits
of Oscar C. Lang, Deceased, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

Statement under Rule 41.

The original parties were Anna E. Lang, as administratrix, plaintiff, and The New York Central Railroad Company, defendant. There has been no change of parties, since the commencement of this action. The firm of Locke, Babcock, Spratt & Hollister, was substituted as attorneys for the defendant, in place of Alexander S. Lyman, Esq., by an order of The Supreme Court entered April 3rd, 1918. Action was started by the service of a summons, January 11th, 1918. Issue was joined by the service of an answer February 13th, 1918. The action arose of an injury alleged to have been sustained by plaintiff's intestate while assisting in switching cars at Silver Creek, N. Y., when he was caught between two cars, sustaining injuries which resulted in his death.

The action was brought to trial before a Justice of the Supreme Court and a jury on the 10th day of June, 1918, and resulted in a verdict of \$18,000, the jury apportioning the verdict giving \$7,000 for the benefit of the widow, Anna Lang; \$2,500 for the infant son, Raymond J. Lang; \$4,000 for infant daughter, Dorothy Lang, and \$4,500 for the infant son, John A. Lang.

Judgment was entered June 13, 1918, for \$18,070.83. The order denying motion for new trial was entered October 22, 1918. Judgment and order were affirmed by the Appellate Division March 5, 1918, by a divided court.

Notice of Appeal from Judgment.

Supreme Court, Erie County.

ANNA LANG, as Administratrix of the Goods, Chattels and Credits of
Oscar C. Lang, Deceased, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

SIRS:

Take notice that the defendant herein hereby appeals to the Appellate Division of the Supreme Court, Fourth Department, from a judgment entered herein in Erie County Clerk's office on the 13th

day of June, 1918, on the judgment entered herein in favor of the plaintiff and against the defendant, for the sum of \$18,000.00 damages and \$70.83 costs; and the defendant appeals from each and every part of said judgment.

Dated July 11, 1918.

LOCKE, BABCOCK SPRATT & HOLLISTER,
Attorneys for Defendant, 814 Fidelity Building, Buffalo, N. Y.

To Julius A. Schreiber, Attorney for Plaintiff, and to Clerk of Erie County.

3 *Notice of Appeal from Order Denying Motion for New Trial.*

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits
of Oscar C. Lang, Deceased, Plaintiff,
against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

SIRS:

Please Take Notice, that the defendant herein, hereby appeals to the Appellate Division of the Supreme Court, Fourth Department, from an order made herein, on the 22nd day of October, 1918, and entered in the office of the clerk of Erie County, on October 23rd, 1918, denying defendant's motion for new trial, on the Judge's minutes and upon all the grounds specified in Section 999 of the Code of Civil Procedure, and the defendant appeals from each and every part of said order.

Yours, etc.,

LOCKE, BABCOCK, SPRATT
& HOLLISTER,
Attorneys for Defendant, 814 Fidelity Building, Buffalo, N. Y.

To Julius R. Schreiber, Esq., Attorney for Plaintiff, and to Clerk of Erie County.

Summons.

STATE OF NEW YORK:

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits
of Oscar C. Lang, Deceased, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this Summons, inclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Erie.

Dated this 8th day of January, 1918.

JULIUS A. SCHREIBER,
Plaintiff's Attorney, Office and P. O. Address,
418 Erie Co. Sav. Bk. Bldg. Buffalo, N. Y.*Complaint.*

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits
of Oscar C. Lang, Deceased, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

The plaintiff above named by Julius A. Schreiber, her attorney, complains of the defendant and alleges:

First. That the defendant now is and at all the times hereinafter mentioned was, a domestic railroad corporation with its office and principal place of business in the City of New York, and engaged in the business of owning, maintaining and operating a steam service railroad in and through the various states of New York, Pennsylvania and Ohio, and is, and at all the times hereinafter mentioned was engaged in interstate commerce.

Second. That heretofore and on the 1st day of November, 1917, one Oscar C. Lang was in the employ of the defendant as a freight conductor upon its lines of railroad in the states of New York and

Pennsylvania, and on that day while performing certain work for the defendant in the vicinity of Silver Creek, N. Y., was engaged in interstate commerce therein.

6 Third. That heretofore and on the 1st day of November, 1917, the said Oscar C. Lang was required by the defendant to assist in the movement of a train of cars, which had been brought from the City of Erie, Pennsylvania; that when the said train reached the said village of Silver Creek, it became the duty of the plaintiff and the other members of the crew to take up a car standing on the siding near the freight house and attach the same to said train, that the said Oscar C. Lang while in the discharge of his duties as such freight conductor, got on top of one of defendant's cars and in attempting to apply the brakes on said car his right foot slipped off the end of said car and while in the act of pulling himself up, the car upon which said Oscar C. Lang was riding collided with the car standing on said siding, and said Lang's right leg was caught between the two running boards of said car, injuring him so severely that he died.

Fourth. Plaintiff further alleges; that the said accident occurred wholly and solely through the negligence and carelessness of the defendant, its agents, servants and employees, and while plaintiff was in the exercise of due care.

Fifth. Plaintiff further alleges, that the car which collided with the car upon which the plaintiff Oscar C. Lang was riding was not equipped with a draw bar, and that the said car and train were then and there being moved, operated and maintained by the defendant in violation of the acts of Congress of the United States, known as the "Safety Appliance Act."

Sixth. Plaintiff further alleges, that the said car which collided with the car on which said Lang was riding was defective in that it was not equipped with a draw bar, that by reason thereof 7 the running boards on top of said two cars came together catching plaintiff's right leg, and that said defective condition caused and contributed to the accident of said Oscar C. Lang, and arose from the negligence and carelessness of this defendant, and which said condition of said car and its equipment and attachment was caused by the negligence and carelessness of the defendant, its agents, servants and employees, and that by reason of such negligence and carelessness and such insufficient and defective equipment the accident occurred.

Seventh. Plaintiff further alleges, that the defendant failed and neglected to make proper and necessary and customary inspection of said car and that an inspection thereof would have revealed its defects and that said failure on the part of the defendant to make such inspection was such negligence and carelessness which caused and contributed to the accident to the said Oscar C. Lang.

Eighth. Plaintiff further alleges that defendant failed and neglected to make and enforce and promulgate necessary and proper rules governing the inspection of the said cars prior to their being placed in the train of which the plaintiff had charge, and failed to warn and advise the plaintiff of the condition of the said car prior to the said accident, all of which were matters of negligence and carelessness on the part of the defendant, which caused and contributed to the accident to the plaintiff.

Ninth. Plaintiff further alleges that at the time of said accident said Oscar C. Lang and this defendant was engaged in interstate commerce within the purview of an act of Congress, commonly known as The Federal Employees' Liability Act, "An act relating to the liability of common carriers of a railroad to their employees in certain cases." An act by Congress and approved by the United States on the 22nd day of April, 1908, and the act supplemental of and amendatory thereof.

Tenth. That the said Oscar C. Lang died intestate in the City of Dunkirk, N. Y., leaving him surviving plaintiff, Anna E. Lang, his widow and three children, viz: Raymond J. Lang, born December 23, 1905, Dorothy M. Lang born February 15, 1913, and John A. Lang, born January 19, 1916.

Eleventh. That on the 13th day of November, 1917, letters of administration of the personal estate of Oscar C. Lang, deceased, were duly issued by the Surrogate's Court of this County to Anna E. Lang who duly qualified and entered upon and still continues in the discharge of her duties as such. That by reason of the foregoing facts plaintiff has suffered damage in the sum of \$50,000.00.

Wherefore, plaintiff demands judgment against said defendant for the sum of \$50,000.00 and the cost of this action.

JULIUS A. SCHRIEBER,
Plaintiff's Attorney, Address and P. O. Address,
418 Erie Co. Sav. Bk. Bldg, Buffalo, N. Y.

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

The defendant answering the complaint of the plaintiff in the above entitled action:

1. Admits the allegations of the complaint contained in the paragraph or subdivision thereof numbered "First."

2. Denies that it has any knowledge or information sufficient to form a belief as to the allegations of the complaint, and each and every of them, contained in the paragraphs or subdivisions thereof numbered "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth," "Tenth" and "Eleventh," except that this defendant admits that on the 1st day of November, 1917, one Oscar C. Lang, then and for some time prior thereto in the employment of the defendant as a freight brakeman, met with an accident at Silver Creek, N. Y., and sustained injuries wherefrom he died, and except that this defendant admits that at the time the said Oscar C. Lang met with said accident and sustained said injuries, both he and the defendant were engaged in acts of interstate commerce.

10 3. Further answering the complaint, defendant alleges, upon information and belief, that the said accident to the said Oscar C. Lang on said 1st day of November, 1917, at said Silver Creek, N. Y., occurred, and the said injuries to him were sustained, by reason of his own negligence.

Second.

For a second, separate and distinct defense to the alleged cause of action in the complaint set forth, the defendant further avers and alleges that the said accident to the said Oscar C. Lang occurred, and the injuries to him were sustained while he was in the employment of the defendant as a freight brakeman; that said employment was at the time the said Oscar C. Lang entered the employment of the defendant, and continued to be, an obviously dangerous one, the risks incident to which were, and continued to be, obvious and well known; and were obvious and well known to the said Oscar C. Lang, and assumed by him, at the time he entered said employment; and obvious and well known to him, and assumed by him, during the entire time of his continuance in said employment; and that the accident and injuries complained upon arose from and were risks incident to said employment, which risks the said Oscar C. Lang took and assumed at the time he entered, and during his continuance in said employment.

Wherefore, the defendant demands that the complaint be dismissed, with costs.

ALEX. S. LYMAN,
*Attorney for Defendant, Room 3510, Grand Central
Terminal, Borough of Manhattan, New York City.*

11 STATE OF NEW YORK,
County of New York, ss:

Edward L. Rossiter, being duly sworn, says, that he is an officer of The New York Central Railroad Company, the defendant above named, to wit, the Treas. thereof; that the foregoing answer is true

to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

EDWARD L. ROSSITER.

Sworn to before me this 13th day of February, 1918.

JOHN A. VETT,

Notary Public,

Westchester County.

Certificate filed in New York and Bronx Counties.

N. Y. County No. 63, N. Y. Register No. 9051.

Bronx County No. 5, Bronx Register No. 905.

My commission expires March 30, 1919.

12

Order Substituting Attorneys.

At a Special Term of the Supreme Court Held in and for the County of Erie, at Court House in the City of Buffalo, N. Y., on the 3rd Day of April, 1918.

Present:

Hon. Edward K. Emery, Justice.

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff,
against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

On reading and filing the consent below written and on motion of Locke, Babcock, Spratt & Hollister, it is

Ordered, that Locke, Babcock, Spratt & Hollister be, and they hereby are substituted as attorneys for the defendant, The New York Central Railroad Company, in the above entitled action in place and stead of Alex S. Lyman.

EDWARD K. EMERY,

J. S. C.

It is hereby consented that Locke, Babcock, Spratt & Hollister be substituted as attorneys for the defendant, The New York
13 Central Railroad Company, in the above entitled action, in place and stead of Alex S. Lyman.

Dated, New York, March 30, 1918.

ALEX. S. LYMAN,

Defendant's Attorney.

THE NEW YORK CENTRAL

RAILROAD COMPANY,

By E. L. ROSSITER,
Treasurer.

STATE OF NEW YORK,
County of New York, etc.

On this 30th day of Mar., 1918, before me personally appeared Edward L. Rossiter, to me personally known and known to me to be the Treasurer of The New York Central Railroad Company, the corporation described in and which executed the foregoing consent, who, being by me duly sworn, did depose and say that he resides in the town of Greenwich, Fairfield County, Conn.; that he is the Treasurer of The New York Central Railroad Company; that he executed the foregoing consent in behalf of and as the act and deed of said The New York Central Railroad Company, and that he so executed the same by authority of the Board of Directors of said Company.

JOHN G. VETT,
Notary Public,
Westchester County.

Certificate filed in New York and Bronx Counties.
N. Y. County No. 63, N. Y. Register No. 9051.
Bronx County No. 5, Bronx Register No. 905.
My commission expires March 30, 1919.

14

Judgment.

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff,
against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

The above entitled action having come on for trial in Part IV of this Court before the Hon. Charles B. Wheeler, Justice, and a jury on the 10th day of June, 1918, and the said jury thereafter and on the 11th day of June, 1918, rendered a verdict in favor of the plaintiff and against the defendant for the sum of \$18,000.00, apportioning said verdict and directing that \$7,000.00 be for the benefit of the widow, Anna Lang; \$2,500.00 thereof for the benefit of the infant son, Raymond J. Lang; \$4,000.00 for the benefit of the infant daughter, Dorothy M. Lang; \$4,500.00 thereof for the benefit of the infant son, John A. Lang; and said verdict having been duly reported to the Court and entered in the Minutes of the Clerk thereof, it is hereby

Adjudged, that the plaintiff recover of the defendant the sum of \$18,000.00 so found by said jury, together with the sum of \$70.83, costs, amounting in all to the sum of \$18,070.83, and that \$7,000.00 of said verdict be set aside for the benefit of Anna

15 Lang, widow; \$2,500.00 for the benefit of the infant son of plaintiff, Raymond J. Lang; \$4,000.00 for the benefit of the infant daughter of plaintiff, Dorothy M. Lang and \$4,500.00 for the benefit of infant son of plaintiff, John A. Lang, and that plaintiff herein have execution against said defendant therefor.

Judgment signed this 13th day of June, 1918.

EDWARD J. CLARK,
Deputy Clerk.

Order Denying Motion for New Trial.

At a Trial Term of the Supreme Court Held in and for the County of Erie, at the City and County Hall in the City of Buffalo, New York, on the 22nd Day of October, 1918.

Present:

Charles B. Wheeler, Justice Presiding.

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Decesased, Plaintiff,
against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

The above entitled action, having come on for trial in Part IV of this Court before the Hon. Charles B. Wheeler, Justice, and a jury on the 10th day of June, 1918, and a verdict having been rendered by the jury on the 11th day of June, 1918, in favor of the plaintiff for the sum of Eighteen Thousand (\$18,000.00) Dollars, and a motion having been made by the defendant for a new trial on the judge's minutes and upon all the grounds specified in Section 999 of the Code of Civil Procedure, Maurice C. Spratt, of counsel for defendant, appearing for said motion, and Julius A. Schreiber, of counsel for plaintiff, appearing in opposition thereto, it is hereby

17 Ordered, that the defendant's motion for a new trial be and the same is hereby denied with costs.

CHAS. B. WHEELER,
Justice Supreme Court.

Granted, Oct. 22, 1918.

FRANK G. SHAPER,
Sp. Dep. Clerk.

18

Clerk's Minutes.

At a Trial Term of the Supreme Court Held at the City and County Hall, in the City of Buffalo, in and for the County of Erie, on the 10th Day of June, 1918.

Present:

Hon. Charles B. Wheeler, Justice Presiding.

Court convenes at 9:45 A. M.

Recess till 2 P. M.

Court resumes at 2 P. M.

ANNA E. LANG, as Administratrix, etc.,
against

NEW YORK CENTRAL RAILROAD COMPANY.

J. A. Schreiber, Hamilton Ward.

Locke, Babcock, Spratt & Hollister (per M. C. Spratt).

Jury.

1. Louis L. Berger.
2. William R. Bliven.
3. Edward R. Roderick.
4. Frederick P. Brice.
5. Herman A. Hammond.
6. Jacob W. Rosendale.
7. John J. Leary.
8. Herbert A. Howard.
9. John Schaefer.
10. Frank W. Lathrop.
11. Charles E. Alvord.
12. Allen E. Klopp.

19 Plaintiff's Counsel opens case.

Defendant's Counsel waives opening.

Witnesses for Plaintiff:

- Edward R. Dauterman.
George Ernst.
George E. Valance.
George Ernst (continued).

Court adjourns to June 11th, 9:45 A. M.
June 11, 1918, Wheeler, J.
Court convenes at 9:45 A. M.

Witnesses for Plaintiff:

George Ernst (recalled).
Anna E. Lang (plaintiff).

Plaintiff rests.

Defendant's Counsel moves for non-suit.
Denied.

Witnesses for Defense:

Martin Culligan.
Timothy Hassett.

Defendant rests. Evidence closed.

Defendant's Counsel moves for a direction of a verdict for Defendant.

Denied.

Counsel sums up.

Court charges the Jury.

Jury retires to deliberate, in the custody of Deputy Sheriffs Fink and Baetzner, who are sworn as officers in charge of this Jury.

Recess till 2 P. M.

Court resumes at 2 P. M.

Jury returns into Court and says it finds a verdict for the Plaintiff for the sum of Eighteen Thousand Dollars (\$18,000.00) and apportioned said damages as follows:

To Anna E. Lang, widow, \$7,000.00.
To Raymond J. Lang, son, \$2,500.00.
20 To Dorothy M. Lang, daughter, \$4,000.00.
To John A. Lang, son, \$4,500.00.

June 20, 1918, Wheeler, J.

Defendant's Counsel moves for a new trial on all grounds under Section 999, Code of Civil Procedure. Argument to be heard at later date.

I hereby certify that the foregoing is a true copy of the Clerk's minutes in the above entitled action.

FRANK G. SHAFFER,
Special Deputy County Clerk, Erie County, N. Y.

21

Testimony.

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix,

vs.

NEW YORK CENTRAL RAILROAD COMPANY.

J. A. Schreiber, Hamilton Ward; of Counsel.
Locke, Babcock, Spratt & Hollister (per M. C. Spratt).

The trial of this Cause was commenced Monday, June 6, 1918, before the Honorable Charles B. Wheeler, Justice, presiding, and a Jury, in Part IV, Room 34, City and County Hall in the City of Buffalo and State of New York.

The empanelling of the jury was begun.

Mr. Ward: I request the Court to require Mr. Spratt to say whether he accepts the jury before I exhaust my list of peremptories.

Mr. Spratt: I decline to do so.

Mr. Ward: If I excuse Mr. Tuttle he will excuse some and then some more will be drawn and as to those I will have no peremptory challenge. It is his duty to exercise his peremptories first.

Mr. Spratt: No. I have a right to wait until the end to determine whether I will accept or not.

The Court: I will overrule your request and give you an exception.

The empanelling of the jury was completed after which Mr. Ward for the Plaintiff opened the case, Mr. Spratt for the Defendant waiving the opening.

22 EDWARD R. DAUTERMAN, was called as a witness in behalf of the Plaintiff and having been duly sworn testified on direct examination by Mr. Ward as follows:

Q. Are you a locomotive engineer?

A. Yes, sir.

Q. You work for the New York Central?

A. Yes, sir.

Q. Do you hear me all right?

A. Yes, sir.

Q. You were the engineer of the train of which Mr. Lang was a member of your crew?

A. Yes, sir.

Q. Where did your train start from?

A. Erie.

Q. And where was it headed for?

A. Buffalo.

Q. What did your train crew consist of, how many men?

A. Conductor and three brakemen.

Q. Mr. Lang was one of the brakemen?

- A. Yes, sir.
Q. Had you any acquaintance with him before this?
A. Have I any?
Q. Did you have any acquaintance with Mr. Lang before this?
A. No, sir.
Q. The conductor was Mr. Ernst?
A. Yes, sir.
Q. When you get orders to do work at these stations do they give
a copy of the orders to the engineer?
A. No, sir.
Q. You did not see the orders?
A. No, sir.
Q. What kind of a train was this?
A. A way-freight, what they call a local.
Q. What did you do when you got to Silver Creek?
A. We went in on the east end.
Q. Well, now, let us see; let me get the general lay of the land
there straightened out a little bit. You were running on what is
called the Lake Shore, were you not?
A. Yes, sir.
Q. That is a double track or a four track?
A. Four track.
Q. Four track road?
A. Yes, sir.
Q. Two tracks for freight, two for passengers?
A. Well, they use it for either.
23 Q. What track did you come in on?
A. On No. 1.
Q. Is that the nearest the Lake or nearest the mainland?
A. Nearest to the main line.
Q. Nearest to the village?
A. Right next to the depot, first track from the depot.
Q. And you were going to take a car off the siding there, were you?
A. Well, now, I can't answer that.
Q. What signals did you get after you got there?
A. We went in on the east end of the house.

Mr. Spratt: House track.

Q. What do you mean by that? You see, your railroad—
A. On the side track, the freight house track where the cars
were on.
Q. That is, you took your whole train in?
A. No, sir.
Q. Just the engine?
A. Just the engine.
Q. East end; now, that is the end toward Buffalo, is it not?
A. Yes, sir.
Q. Who gave you the signals for that movement?
A. My brakeman.
Q. Who was that?
A. Mr. Chessel.

Q. What did you do when you went in on the east end of the house track?

Mr. Ward: Am I correct in calling it the house track, Mr. Spratt?

Mr. Spratt: Yes.

The Witness: Yes, that would be right.

Q. What did you do when you went in there?

A. Well, now, I can't just remember but I think that we took a car out of there.

Q. How many cars?

A. I should say about one; I am not going to say positively whether one or two.

Q. What time of day or night was this?

24 A. Well, it is so long ago I haven't kept that——

Q. Was it day time or night time?

A. Yes, sir, day time.

Q. What did you do with this one car that you pulled out?

A. We hung on to it.

Q. Where did you take it?

A. Away down to the side track.

Q. Sir?

A. Up the side track.

Q. Then what is the next thing you did?

A. Got hold of some cars on the grape track.

Q. On the what track?

A. On the grape track, that is the track next to the house.

Q. That is another switch track?

A. Yes, sir.

Q. Did you still have this car with you, this one you had taken hold of first or did you drop that?

A. No, we didn't make no drop of it at all.

Q. Still with you?

A. Still with us.

Q. Were they connected on the front end or back end?

A. On the back end of the engine.

Q. Did you then have to connect these other cars that you took off the grape track?

A. Not on the back of the engine, no.

Q. Put them on the front?

A. In the front.

Q. What did you do with them?

A. Made a shift on the freight——

Q. Tell us what you mean.

A. Made a shift on the house track.

Q. Tell us what you mean by that.

A. Well, the first track, what we call the house, that is the freight house track, and the track next to that is what we call the grape track; them are the two sidings where they unload cars; grape track is where they unload cars and freight house track is where they unload freight for the freight house.

Q. Then what did you do?

A. We made one shift on the house, on the house track.

Q. Can't you tell us that in common talk, not railroad talk?

A. Well, what more? Isn't that plain?

25 Q. Not to me, Mr. Dauterman.

A. Well, I should think it would be very plain.

Q. Well, what did you do with these cars?

A. Well, I will—

Q. Wait a minute; your lawyer is going to explain.

(Mr. Spratt explains to Mr. Ward.)

Q. You finally had to take some cars off the house track, did you not?

A. We went in on the team track. Now I will talk team track to you; will that be plainer to you?

Q. Probably. Go ahead.

A. Then we got three or four cars off the team track and we put them on the house.

Q. Yes.

A. And that is when Mr. Lang got hurt.

Q. How far away were you from him when he got hurt?

A. Well, they kicked the cars in there and I run down the siding and when I got there he says to me, "Ed," he says—

Q. You cannot tell what he said.

A. All right then, I won't tell that.

Q. Did you kick these cars in on the siding?

A. Yes, sir.

Q. How did you do that?

A. Why, just give them a little start, that is all.

Q. And then they go by themselves?

A. Yes, sir.

Q. After you give them a little start you cut them loose from the engine?

A. Yes, sir.

Q. How far were you trying to kick them?

A. Oh, don't—not much of a kick there.

Q. How far were you trying to kick them?

A. About ten feet.

Q. Ten feet?

A. That is all, about that, I kicked them about ten feet.

Q. What were you going to kick them up against?

A. Up against the other cars.

26 Q. Is that the way they do in railroading, keep the cars close together?

A. Yes, sir.

Q. Up in contact with each other?

A. Yes, sir.

Q. And your intention was then to give these cars a sufficient kick so that they would go up against the other cars?

A. Yes, sir.

Mr. Spratt: I object to that as leading, suggestive and calling for a conclusion.

The Court: Well, it is in.

Mr. Spratt: I ask it be stricken out.

The Court: I will deny the motion and give you the exception.

Q. About how far did these cars have to go, did you see, when you let go of them?

A. Why, didn't have to go over a car length, I believe.

Q. About a car length?

A. About a car length.

Q. How many cars were there in that string that you kicked in on the house track?

A. Three cars.

Q. Well, in the railroad business when you kick cars in on a track like that, do you have a man riding on them?

A. If it is in a place that needs it, they do; if a place that don't, they don't.

Q. Do you know whether there was any man riding on those cars that you kicked in?

A. He wasn't that time.

Q. Did you see whether there was any man riding on them?

A. I said he wasn't at the time.

Q. Wasn't riding on them?

A. No, sir.

Q. Where was he when you saw him?

A. Standing on the car.

Q. Which car?

A. At the brake, on the head car, the east car.

Q. That is, he was standing on the car?

A. East car.

Q. That you kicked in?

A. Yes, after I saw him, yes.

Q. That was when you saw him?

A. Yes.

27 Q. Was that before you kicked them in or afterwards?

A. After I kicked them in.

Q. What kind of cars were they?

A. They were refrigerator cars.

Q. Box cars?

A. Merchandise despatch cars, yes, sir.

Q. Afterwards did you go in there and look at the car that he went up against?

A. No, sir.

Q. Did you see that car at any time?

A. No, sir.

Q. Did you see him after the accident?

A. Yes, sir.

Q. Did you help take him down?

A. No, sir.

Q. You stayed on your engine?

A. I got off the engine.

Q. Where did you go?

A. Looked for a plank to get him down.

- Q. Did you help take him down?
A. Yes, sir.
Q. And didn't you see that car then that he went up against?
A. After it happened?
Q. Yes.
A. Yes, after it happened I did.
Q. What was the condition of that car that he went up against?
A. Drawbar was out of it.
Q. What is the drawbar?
A. Why, it is where they couple together.
Q. And does that include the coupling and the knuckle and the whole business?
A. Yes, sir.
Q. The whole thing was gone?
A. Yes, sir.
Q. Was it laying there?
A. No, sir.
Q. Wasn't there at all?
A. Didn't see it there.
Q. What kind of a car was this that the drawhead was gone from?
A. Box car.
Q. You remember what kind of a box car?
A. No, sir.
Q. You know whether it was loaded or empty?
A. I couldn't say.
Q. How many other cars were there on that siding there?
A. I couldn't say.
Q. Well, about?
A. I couldn't say.
28 Q. Several?
A. Yes, there were several.
Q. Were there other cars back of this defective car?
A. I couldn't tell you.
Q. Did the car that you took out of there come from a point next to the defective car?
A. It must have.
Q. So that you pulled the car out of there—
A. I didn't pull any car out of there.
Q. Didn't you pull a car out of there?
A. Not to my knowledge, no, sir.
Q. Well, where did you get these cars from that you were putting back in there?
A. On the team track.
Q. Is that the next track?
A. Yes, sir.
Q. So that you took cars off the team track to put on this track?
A. Yes, sir.
Q. Who told you to do that?
A. The brakeman.
Q. What brakeman was that?
A. Mr. Chessel.

Q. He is here, is he?

A. Yes, sir.

Q. How close up against the defective car could the other car come with that drawhead out, Mr. Dauterman?

A. How close would it come?

Q. Yes.

A. Well, now, I couldn't answer that question. I couldn't answer that question.

Q. Would it come up against the end of it?

A. I can't answer that question.

Q. What part of the cars would strike when that drawhead was out?

A. What part of the car did it strike?

Q. What part of the cars would strike together with the drawhead gone out of one of them?

A. Strike the east end—or the west end.

Q. What part of the cars would it strike first?

A. I can't answer that question.

Q. Would the drawhead of the car that you kicked in there go into the hole where the other drawhead came out?

A. It might; it might not.

Q. Do you know whether it did or not on this occasion?

A. I couldn't say.

29^o Q. How close were the cars together when you got down there to help Mr. Lang down?

A. They weren't together at all; they were apart.

Q. How much apart?

A. I should judge about two feet.

Q. Those cars, in the condition they were in at that time, could not couple automatically on impact, could they?

Mr. Spratt. Objected to as a leading question.

The Court: He may answer.

A. Not with the drawbar out.

Q. What did you do with Mr. Lang?

A. We took him off the box car, put him in the caboose and took him to Dunkirk.

Q. Was he conscious?

A. Yes, sir.

Q. Appear to be suffering?

A. No, sir.

Q. Where was he hurt?

A. Well, all I know they tied up his leg here; that is all I know; we couldn't see it.

Q. Bleeding?

A. Yes, sir.

Q. Leg smashed?

A. I couldn't tell you.

Q. Did you take his clothes off?

A. No, sir.

Q. Didn't do anything for him?

- A. No; just took and tied it up with a bell cord.
Q. And took him to the Dunkirk—
A. Hospital.
Q. Left your train there?
A. Yes, sir.
Q. That is a short distance from Dunkirk?
A. Yes, sir, about ten miles.

Cross-examination.

By Mr. Spratt:

- Q. This accident, you say, happened on the team track?
A. No.
Q. What track?
A. On the house track.
Q. The house track, that was the track next to the freight house?
A. Yes, sir.
Q. Was that the track where they unloaded cars there?
A. Yes, sir.
30 Q. At Silver Creek. Your business is to run the engine?
A. Yes, sir.
Q. You take the signals from the conductor and the brakeman?
A. Yes, sir.
Q. As to where you go. And so whatever movements were made by your engine in switching there were made in answer to signals given by the conductor and brakeman?
A. Yes, sir.
Q. Of which Mr. Lang was one?
A. Yes, sir.
Q. Now, to get right down to the time that you put the cars in on the house track, you say that you shunted the cars in there?
A. Yes, sir.
Q. Some three or four cars you thought?
A. There were about three cars, I should judge about three cars.
Q. And you shunted them in in answer to a signal from some of the train crew?
A. Yes, sir.
Q. Who gave you the signal to put it in?
A. Mr. Chessel.
Q. What kind of a movement did you make to shunt it in?
A. Why, didn't give them much of a start at all.
Q. Was it an easy—
A. It is a little down hill in there and they will run.
Q. Was it an easy start you gave it?
A. Yes, sir, easy.
Q. Whose duty is it to stop the cars when they are put in in that way?
A. The brakeman.
Q. And how do they stop?
A. Why they generally get on top and set a brake.

Q. When you started to shunt the cars in there you don't know who was on the cars at that time?

A. I didn't see anybody on the cars at that time.

Q. You didn't see Mr. Lang until after the accident happened?

A. That is it.

Q. Then he was up there on top of the car?

A. He was on top of the car.

Q. This was in day time, was it?

A. Yes, sir.

Q. Was it clear daylight?

A. Yes, sir.

31 Q. Was there any trouble in anyone's seeing this car that was standing on the track there that had the drawhead out?

A. Was there any trouble of anybody seeing it?

Q. Yes.

A. Not that I know of.

Q. Could it be seen easily?

A. It could certainly have been seen easily.

Q. And when you got down there these cars were about two feet apart?

A. Yes, sir.

Mr. Spratt: That is all.

GEORGE ERNST, was called as a witness in behalf of the plaintiff and having been duly sworn testified on direct-examination by Mr. Ward as follows:

Q. What is your business?

A. Conductor.

Q. Were you the conductor of Mr. Lang's crew?

A. Yes, sir.

Q. This accident happened what date?

A. Why, I just forgot the date now.

Mr. Spratt: November 1, 1917.

The Witness: November 1st.

Q. Had Mr. Lang run with you before?

A. Why, he was on with me, my regular brakeman.

Q. How long had he run with you?

A. I could tell by looking at my book now.

Q. Well, just roughly?

A. He was on there a couple of months; month and a half.

Q. And seemed to be an experienced, competent man?

A. Yes, sir.

Q. Was his work all right?

A. Yes, sir.

Q. Was he a man in good health?

A. Yes, sir.

Q. And as long as you ran with him you had no occasion to find fault with him?

A. No, sir.

32 Q. Are you familiar with that track outlay there at Silver Creek?

A. Yes, sir.

Q. Could you make a little sketch there on that blackboard and show us how those tracks are?

A. Yes, sir.

Mr. Ward: May I have the Court's permission for Mr. Ernst to do so?

The Court: Yes.

A. (Draws sketch on board.) Here is track No. 1; this is the side track and this is the house track and this is the grape track (indicating), that is where they load grapes in grape season. Sometimes they call it the team track.

Q. Just mark the names on them.

A. (Marking.) This is No. 1.

Q. That is the main track, is it?

A. Main track. Now, there is a switch here on the house connects with this (drawing sketch), that is the house track switch at the east end.

Q. East end towards Buffalo?

A. Towards Buffalo.

Q. Well then we have got the top of the map to the south, have we?

A. Got the top of the map to the south.

Q. I will mark it south. And this is north down here and this is east and that is west (marking on sketch).

A. This switch here runs from No. 1 to the house track; that is the east end; this is the main track to Buffalo and there is a switch in here—or this is the siding—just a minute; this is the siding, that track; it happened over here, and this is the house track (indicating).

Q. All right. Show us where the house track is.

A. Just a minute; I think I have got that too far; the side track runs the other way; this is No. 1; the side track comes in about here; the house track or the side track; this is the side track; the house stands here, house track; this is the switch; No. 1, that is 33 house track and then here is a siding runs in here like that (indicating); this house track comes down in through here. There is a switch right here goes into the house; this is a switch here goes into the siding right here (indicating).

Mr. Ward: Perhaps the station agent there could make that thing.

Your Honor I have the station agent under subpoena. If Mr. Ernst would step aside the station agent could draw it; perhaps he is more familiar with it.

The Court: Have you a sketch of it?

Mr. Spratt: Yes, I have a sketch.

Mr. Ward: That is too small.

The Court: All right; call the other witness.

GEORGE E. VALANCE, was called as a witness in behalf of the plaintiff and having been duly sworn testified on direct-examination by Mr. Ward as follows:

Q. You are the station agent for the New York Central at Silver Creek?

A. Yes, sir.

Q. And you were in November, 1917?

A. Yes, sir.

Q. You are familiar with the track outlay and so on there?

A. Why, somewhat, yes, sir.

Q. Will you be kind enough to put that track outlay there on the board, putting the north toward the top; I think we will all be more familiar with it that way.

A. The north?

Q. To the top of the board, yes. If that means twisting you up, why, don't try it, but that helps us always in a map to have the north at the top.

A. This you want north and this you want south and this east and this west (drawing on board). You want where these tracks join, as near as I can remember?

34 Q. Yes, where the switches are so that we can see how the movements were made, where the connections are between the various tracks, where they come together.

A. (Draws on board.) That is as near as I can remember.

Q. Now you have placed on the board a diagram showing the station or freight house?

A. That is the freight house (indicating).

Q. And north of the freight house three parallel tracks?

A. Yes. More than that. Do you want them all?

Q. No; only those involved. The first track nearest to the freight house is what?

A. This one (indicating)?

Q. Yes, sir.

A. That is what they call a house track.

Mr. Spratt: Mark it at the end; I would suggest over at the end there.

The Witness: (Marks as requested.)

Q. The second track is what?

A. This one (indicating).

Q. Yes, sir.

A. That is the siding.

Q. And the third track is what?

A. This one (indicating)?

Q. No; the upper.

A. The main.

Q. No. 1?

A. Yes, sir.

Q. The track to the south of the station is the grape track?

A. This is the grape track here (indicating).

Q. How do you get from the main track to the siding, where is the connection?

A. The main track to the siding, this siding (indicating)?

Q. Yes, sir.

A. At which end?

Q. Either end?

A. Get in here (indicating), there is a crossover there.

Q. From the main track to the siding how do you get in?

35 A. From the main track down here (indicating)?

Q. Show us where they run together?

A. (Witness indicates.)

Q. Does the siding connect with the main track at the west end too?

A. No; goes on through; that is a long siding.

Q. So that the siding connects with the main—

A. (Witness draws on sketch.)

Q. Just a minute. So that the siding connects with the main track at the east end?

A. Yes, sir.

Q. And the house track connects with the siding at both ends?

A. Yes, sir.

Q. And here is also an intermediate crossover between the house track and the siding near the freight station?

A. Yes, sir.

Q. The grape track is south of the freight house?

A. Yes, sir.

Q. And connects with the house track at a point some distance west of the freight house?

A. Yes, sir.

Q. All right. Now you can go back on the witness stand. Silver Creek is a way station on the main line of the Lake Shore, is it?

A. The old Lake Shore, yes, sir.

Q. And you are the station agent there?

A. Yes, sir.

Q. You receive and send out freight cars daily?

A. Yes, sir.

Q. This train that was involved in this accident was a way freight that came through at the same time every day?

A. Why, practically, yes, sir.

Q. And let off and took on cars at your place?

A. Yes, sir.

Q. This way freight came from Erie and went to Buffalo; am I correct in that?

A. Yes, I think it was the eastbound local, yes, sir.

Q. On the day of the accident did you have a car on one of your tracks with a defective—will the drawbar out?

36 A. That is what my records show, yes, sir.

Q. And what kind of a car was it?

A. Box car.

Q. How long had it been there?

A. Records show the car arrived there—You are speaking of the box car?

Q. Yes, the defective car.

A. My records show it arrived there October 16, 1917.

Q. Where did it come from?

A. From Beaver Falls, Pa.

Q. What was it loaded with?

A. Steel.

Q. Consigned to where?

A. Silver Creek.

Q. Had it been unloaded at the time of the accident?

A. It had not; still under load.

Q. And was it in the defective condition in which it was at the time of the accident at the time it arrived?

A. Not according to the records.

Q. When was the drawhead pulled out?

A. I couldn't tell you. No record of it.

Q. How long had it been out before the accident?

A. That I couldn't answer.

Q. Did you know it was out at the time of the accident?

A. No, sir.

Q. What track was that car on?

A. The house track.

Q. East or west of the freight station?

A. Well, I should say in the vicinity of the freight house.

Q. About in front of it?

A. Well, somewhere near there, yes.

Q. Were there other cars on that track before this wayfreight came along?

A. Yes, sir.

Q. Cars on both sides of the defective car?

A. Yes, sir.

Q. Was there a car there that you wanted that wayfreight to take out?

A. Why, that I couldn't tell you.

Q. Did you give any orders for the particular movement that occurred there?

A. Not personally, no, sir.

37 Q. Did you know what was to be done there?

A. Yes, sir.

Q. Are you in charge of that movement?

A. Not that part of it. My clerks attend to that.

Q. Sir?

A. I have clerks to attend to that.

Q. I mean, under you, of course?

A. Of course, I presume the local had what we call a switching list, orders on a list.

Q. Have you got that switching list with you?

A. No, sir; they are destroyed after the work is done.

Q. Can you tell us whether there was a car in that string of cars

in which this defendant car was that was to be taken out by the way freight?

A. I couldn't tell you that.

Q. Were you there at the time of the accident?

A. No, sir.

Q. Who was in charge there as far as your station was concerned at that time?

A. Why, that immediate locality, the chief clerk.

Q. Is he here in court?

A. No, sir.

Q. Did you examine the defective car afterwards?

A. I did not, no, sir.

Q. Did you ever look at it?

A. No, sir.

Q. You know which end the drawbar and coupler was out?

A. The records show the west end.

Q. West end?

A. Yes, sir.

Q. That siding is used for the purpose of storing freight cars that are to be loaded and unloaded at the freight house?

A. Not storing them; they are set in there for that purpose.

Q. Set in there?

A. For the purpose of loading and unloading.

Q. Move out as exigencies require?

A. As occasion requires, yes, sir.

Q. Do you know whether this car loaded with steel from Pennsylvania had been standing right there in that place all the time or whether it had been shifted from time to time?

38 A. No; I think it had been shunted.

Q. Do you know how long it had been standing in that position?

A. No, I couldn't tell you how many days it had been there.

Q. In bringing cars in and taking them out I suppose it is necessary to shift those cars that were there on the siding back and forth?

A. Yes, sir; handle them every day.

Q. Part of the necessary movements to get them every day and get other freight in?

A. Yes, sir; accommodate the patron.

Q. That is done by the crews of the freight trains that come along?

A. Yes, sir.

Q. You do not keep crews there for that purpose?

A. No, sir.

Q. Who makes up the switching list of the cars that are to go out from your station when this wayfreight comes along?

A. Well, usually the second clerk, the man that keeps the car records.

Q. And is it a matter of daily occurrence that cars go out of there?

A. Yes, sir.

Q. And also that cars come in there?

A. Yes, sir.

Q. It is somewhat of a manufacturing point, Silver Creek, is it not?

A. Yes, sir, largely so.

Q. What records have you got here?

A. I have the yard book that shows the position of the cars on the various tracks outside of the long passing sidings every morning at seven o'clock, this book here (indicating), and then this is the permanent record of the cars that arrive and depart from the station.

Q. Now take your yard book and tell us from that what cars were adjoining this defective car.

A. On this date?

Q. Yes, sir.

A. Do you want it on this board?

Q. Yes, sir.

A. Now, this is seven o'clock in the morning.

39 Q. Yes, sir.

Mr. Spratt: What time did this accident happen?

Mr. Ward: He wasn't there.

Q. You are putting now car numbers on?

A. Yes, sir. This is the car with the defective drawhead (indicating).

Q. That was 2936. And east of that?

A. A. & W. P. was the initial of it.

Q. East of that was what?

A. 43868 C. B. & Q.

Q. What was in 43868 C. B. & Q., what was in that?

A. That was a car loading with machinery for the West.

Q. Car loading?

A. Yes, sir.

Q. What was the other side of the defective car?

A. L. E. & W. 12085.

Q. What was that loaded with?

A. That was what we call a peddler house car with various freight in it for Silver Creek and possibly other points, what we call a peddler.

Q. Then there were in all on that track ten cars?

A. Ten cars at seven o'clock that morning.

Q. This defective car was east of the crossover between the house track and the siding, was it?

A. Yes, sir.

Q. In your practice there do they keep those cars close up together?

A. Why, that depends entirely upon the—as I told you—the accommodation of the customer; if it requires them to be close together, they are placed close together; if they are required to be remote from each other we place them that way.

Q. How many cars can be accommodated on that track?

A. Why, probably maybe get 12 cars in there.

Q. You had 10 cars that morning?

A. 10 cars at seven o'clock, yes, sir. Possibly moved this other car—

40 Q. Do your records show which car was to be taken out by this wayfreight?

A. No, sir. The switching list would show that.

Q. You haven't that, have you?

A. No, sir, that has been performed and destroyed.

Mr. Spratt: What have you written on the board there?

Q. You have also put the number and name of a fourth car?

A. That is the second car west of the defective car at seven o'clock in the morning.

Mr. Ward: I do not think I will trouble you—

Mr. Spratt: What was the number?

A. New York Central 152485.

Mr. Ward: I do not know of any purpose in putting on any more. I think that is all.

Cross-examination.

By Mr. Spratt:

Q. So as the cars stood there in the morning on the track to the west of this defective car was L. E. & W. No. 12085?

A. 12085, yes, sir.

Q. And next west of that was New York Central car No. 152485?

A. Yes, sir.

Q. That was the order in which they stood west?

A. Yes, sir.

Q. You say that this car A. & W. P., the defective car, 2936—is that it?

A. Yes, sir.

Q. —was loaded with—

A. Steel.

Q. —iron ore?

A. Steel.

Q. Steel for someone in Silver Creek?

A. Yes, sir.

Q. What was the concern?

A. Huntley Manufacturing Company.

Q. And it was being held there to be unloaded by them?

A. Yes, sir.

41 Q. The track where this defective car was on at the time of the accident, was that where the people came to unload?

A. No. Why, you can unload; we unload from this portion of it west of the house here and about one or two cars east of the house, but if we have a car on there requires team track unloading, why, we send it over here on this track (indicating).

Mr. Ward: On the grape track?

The Witness: This is all ground along in here for teams, you know (indicating).

Q. But teams could unload on both tracks?

A. Yes, a small amount of team work on the house track.

Redirect examination.

By Mr. Ward:

Q. Where was this defective car to be unloaded when it was unloaded?

A. Beg pardon?

Q. Where did you unload this defective car when you unloaded it?

A. Why, I think the finish of it was done at the house.

Q. It was not being unloaded on this day?

A. By the team?

Q. By any means?

A. Why, I think it was; I think it was set at the house to finish the unloading of it.

Q. On the day of the accident?

A. Yes, sir.

Q. You don't know whether anything had been unloaded from it before?

A. I think there had.

Q. Partly unloaded, you think?

A. Yes, sir.

Recross-examination.

By Mr. Spratt:

Q. I just show you a sketch. Does that represent substantially the situation as it was so far as it is represented on that?

A. Yes, sir, that is the layout as far as this goes, on the east end.

The west end is not indicated.

42 Q. The grape track is not?

A. The grape track runs off here (indicating).

Q. Will you just mark with a lead pencil where the grape track is?

A. (Witness marks as requested.)

Mr. Spratt: Witness marks in red lead pencil a line.

Q. Does the house track connect up with Track No. 1 west?

A. No. With the siding. To get onto No. 1 you have got to go down that way (indicating); it is a long siding there.

Mr. Spratt: I ask that be marked for identification.

The sketch referred to was marked Defendant's Exhibit A for identification.

Mr. Spratt: That is all.

GEORGE ERNST, was recalled as a witness in behalf of the plaintiff and direct examination resumed by Mr. Ward as follows:

Q. Mr. Ernst, now will you look at that sketch the last witness has placed on the board? Do you recognize that, get the bearings of that?

A. Yes; yes, sir.

Q. You came from the west with your train, did you not?

A. From the west.

Q. You came in on No. 1 track?

A. No. 1.

Q. What orders did you have for business at Silver Creek?

A. Same orders we get every day, switching.

Q. Did you have a list handed to you?

A. Yes, sir.

Q. When you get there?

A. Yes, sir.

Q. You do not know what you are going to do until you
43 get there?

A. No, sir. Know what I am going to do with my train,
what is in my train.

Q. If you have any cars to put off?

A. Yes, sir.

Q. You know that?

A. Yes, sir.

Q. But what cars you are to take on, you don't know until you
get there?

A. No, sir.

Q. Did you have any cars to pick up there at Silver Creek?

A. Yes, sir.

Q. How many?

A. One car.

Q. What is the first move you made after you came in with your
train on the main track?

A. Well, I went in the office and got our switching list, what we
call a switching list. That tells us what to do, and we went out
and cut off the engine and one car and came in on the east end of
the house track.

Q. Go a little slow. That is, you stopped your train where?

A. To clear the switch right there.

Q. Was that the hind end?

A. No, the head end clear of the switch; the hind end was back.

Q. Train was back along here somewhere (indicating)?

A. Yes.

Q. The head end of it near to the switch?

A. Yes, sir.

Q. Then you cut off the engine and one car next to the engine?

A. Yes, sir.

Q. Then went on beyond the switch?

A. Yes, sir.

Q. Then what did you do?

A. Backed in on the house track.

Q. With this one car?

A. Yes, sir.

Q. What is the next move you made?

A. Well, then we had orders—our switching list called for to take a car off that siding for Farnham, in the house track for Farnham; Farnham is the second station east. We cut the engine off and went around through the siding.

44 Q. That was clear?

A. Yes, sir.

Q. That is, you backed on it?

A. Backed up with the engine through the siding.

Q. Left this car on the house track?

A. Left this car on the house track.

Q. Then backed up on the siding?

A. Yes, sir.

Q. To what point? To the switch that runs into the house track from the west end, away out here (indicating)?

A. Yes, right here (indicating).

Q. Out here (indicating)?

A. Yes.

Q. Well, then, what did you do?

A. Well, we went in there and the car that we was to get for Farnham was the car west of the car with the drawbar out.

Q. West of the car with the drawbar out.

Mr. Ward: I will put a circle around this defective car. Have you any objection, Mr. Spratt?

Mr. Spratt: No.

Mr. Ward: That is our starting point all the while.

Q. Have you any memoranda of what that car was?

A. I haven't here but I have in the book.

Q. You haven't in your book?

A. I have in the train book.

Q. Was that it, the number the last witness put on the board?

A. I can't remember.

Q. But you know it was the next car west of the defective car?

A. Next car west of the defective car.

Q. Why didn't you take it out from the east end of the house track?

A. Because the drawbar was out of the west end of that car and you couldn't handle it.

Q. You found that out after you got there?

A. Yes, sir.

Q. Went and looked at it?

A. Why—

45 Q. Or did somebody tell you?

A. Yes, the drawbar was out of the west end of that car; we would have no way of getting our car out.

Q. That means, I suppose, that you could not pull that car out because the connection between the defective car and the car you wanted could not be made?

A. Yes, sir.

Q. So that you had to move around to the other end of that car where you could hook onto it?

A. Yes, sir.

Q. And where the connections between that car and those cars between you and it could be made?

A. Yes, sir.

Q. These cars, in order to handle them they have to be coupled together, have they not?

A. Yes, sir.

Q. And when they are in proper condition they are equipped with couplers that couple automatically on impact?

A. Yes, sir.

Q. Push them together they lock?

A. Yes.

Q. When you want to take them apart you step up to the side and pull the handle?

A. Raise the lever.

Q. And when cars are in perfect condition the couplers come together?

A. Yes, sir.

Q. That keeps the bodies of the cars apart, does it not?

A. Yes, sir.

Q. How far apart are the bodies of the cars when the couplers are in good condition?

A. You mean the center of the car?

Q. Ends; the ends of box cars?

A. Oh, I don't know; they must be a couple of feet in there.

Q. If this car had not been in defective condition, would you have drawn your car out from the east end?

A. Yes, sir.

Mr. Spratt: Objected to as incompetent and immaterial and I ask that the answer be stricken out.

46 The Court: Well, it is not very material. I will let it stand.

Mr. Spratt: Exception.

Q. How many cars were there west of the defective car on that siding?

A. I think it was six cars.

Q. Were they all coupled together?

A. Yes, sir.

Q. You found all the cars coupled together there except between the defective car and the next one west of it?

A. Yes, sir.

Q. And after you passed your engine west over the siding you backed in there on the house track and coupled it to all those cars?

A. Coupled onto the cars that was on the house.

Q. Onto the six cars?

A. Yes, sir.

Q. Which included all the cars east as far as the defective car?

- A. West of the defective car.
Q. West of the defective car, all the cars west of the defective car?
A. West of the defective car.
Q. Then you pulled them out?
A. Yes, sir.
Q. What did you do with the car you wanted?
A. Kicked it down the side track.
Q. That means that you drew all that string of cars onto the siding and by the switch point?
A. Yes, sir.
Q. And then your engine backed up?
A. Went ahead, what we call going ahead; it was headed east.
Q. Went ahead toward the east?
A. Yes, sir.
Q. Then you cut that one car loose?
A. Cut that one car loose.
Q. And stopped the engine?
A. Stopped the engine.
Q. Which stops the other cars?
A. Yes, sir.
Q. And then the car that is cut loose, not being stopped by the engine, goes of its momentum onto the place you want it
47 to go?
A. Yes, sir.
Q. That is what is called kicking a car?
A. Yes, sir.
Q. Then what did you do with the other five cars that you did not have any use for?
A. Well, sir, we kicked two of them in on the grape track.
Q. You had orders for that?
A. Yes, sir.
Q. That is the same process that I mentioned with the other car?
A. Yes, sir.
Q. Then what did you do with the remaining three?
A. Kicked the other three back on the house.
Q. Was that also in accordance with orders you had?
A. Yes, sir.
Q. That was done in the same way?
A. Yes, sir.
Q. How is that grade there, which way?
A. Well, it is a little inclined to be down grade east.
Q. West higher and east lower?
A. Yes, sir.
Q. So that when you kicked these three cars back toward the defective car on the house track they were going down hill?
A. Well, we call it pretty near level; it can't be much of a hill.
Q. Down slight grade?
A. Down slight grade.
Q. And did your engine cut loose from those three cars?
A. Yes, sir.

Q. How far from the point where your engine cut loose from those three cars was the defective car?

A. About five or six cars.

Q. Five or six cars. So that there was how much space between your last car and the defective car when the engine let go of them?

A. Well, that is about the distance, about five or six cars.

Q. So that the last car had to travel five or six cars?

A. The last car that he—the last car of the string had to travel about five or six cars.

Q. Before it got to the defective car?

A. Yes, sir.

48 Q. And was it your purpose to put the string up against the defective car where you had taken it from?

A. Yes, sir.

Q. Why did you do that?

A. Leaving them on the same track.

Q. Are you supposed to keep the cars up close together?

A. We are supposed to keep all cars close together, coupled together when we get through.

Q. They are supposed to be left coupled together?

A. Yes, sir, but this car wasn't supposed to be left together.

Q. Because you couldn't couple it?

A. Because we couldn't couple it; there was no coupler there.

Q. Was that your practice to put it up against the other car?

Mr. Spratt: I object to that as leading and suggestive.

Q. Is that correct?

A. No, sir, to leave it in to clear the side track, the three cars.

Q. Who decides how much of a kick to give those cars?

A. The man that is working the middle of the train, my foreman.

Q. Sir?

A. My foreman.

Q. Well, the amount of force that is applied to those cars depends on the engine, does it not?

A. All by a signal given to the engineer.

Q. By the engineer?

A. Yes, sir.

Q. And was there anyone on those three cars?

A. Yes, sir.

Q. Who was on the three cars?

A. Mr. Lang.

Q. Was that his duty?

A. Yes, sir.

Q. What was he on the three cars for?

A. To ride them in.

Q. What did he have to do up there?

A. Set the brake to stop them when they got into clear.

Q. By getting into clear, you mean?

A. The side track.

49 Q. Did you notice where he was riding?

A. Well, I didn't notice where he was riding; I noticed he got on that head car.

Q. Did he get on the car before—

The Court: The one that would come up, the one nearest to the crippled car as they moved along?

Q. That is what you mean, is it not?

A. That is what I mean, the one nearest the cripple.

Q. Did he get on before the cars were started, or after?

A. After they were started.

Q. Is that customary in railroading?

A. Yes, sir.

Q. And does the brakeman usually ride the head car?

A. Ride any place he can get on to stop the cars when we are switching cars.

Q. That is, if there is anything on the track or any obstacle in the way and he is riding on the head car he can see it better?

A. He can see it.

Q. He had to travel, you say, five or six car lengths to reach the defective car?

A. Yes, sir.

Q. Did you notice the cars after the engine kicked them down in toward—

The Court: To operate the brakes did he have to climb to the roof of the car?

The Witness: Yes, sir.

Mr. Ward: What did your Honor say?

The Court: I say, to operate the brakes, did he have to climb to the roof of the car.

Q. Is that correct; you have to be on the roof of the car to operate the brakes?

A. The box cars you do but coal cars you don't.

Q. These were box cars?

A. These were box cars.

Q. The defective car was a box car?

A. The defective car was a box car.

50 Q. Did you look at that defective car before the accident?

A. Did I look at it before the accident?

Q. Yes.

A. Well, not that day I didn't.

Q. Had you seen it there before?

A. Yes, sir.

Q. Was the whole drawhead out?

A. Yes, sir.

Q. How long had you noticed it there in that condition?

A. Oh, about two trips, I think it was; about four days; three days.

Q. You make a trip every other day?

A. Every other day; up one day and down the next.

Q. And on two previous trips you had seen it?

A. Yes, sir.

Q. In the same place or a different place on that siding?

A. Different place.

Q. In doing your switching work there had you had occasion to move that around?

A. Once.

Q. That is, it is sometimes necessary to make room for your other cars and handle your business?

A. Yes, sir.

Q. And on this occasion you figured on making this movement without handling the defective car?

A. Yes, sir.

Q. Where did you stand when this last kicking movement was made?

A. At the switch.

Q. Which switch?

A. The side track switch that leads into the freight house—or not the side track switch; the grape track switch that leads off the house track.

Q. And that was about how many car lengths from the place of the accident?

A. Oh, about—that is about, oh, I should judge about four cars.

Q. Did you see Mr. Lang up there?

A. I saw him when he got on the car.

Q. How far was his car from the defective car when he got on?

A. Well, about—well, it was pretty near four car lengths; he got on pretty near where I was.

51 Q. And how fast was the string of cars going at that time?

A. Why, I don't know. Not very fast; just an ordinary kick, what they call kicking a car.

Q. Of course, there is no other force applied to those cars except the force that the engine applies to them, is there?

A. That is all.

Q. Then what happened?

A. Well, he—when he got on there and rode that car in, we were through there then with that track, so we started down to get hold of this car that we switched out to take to Farnham.

Q. The one that you had kicked down on the siding?

A. He kicked down on the side track.

Q. That is the one you pulled out?

A. Yes, sir. One of my brakemen got on.

The Court: That stood at that time where?

Q. That stood at that time where?

A. On the side track.

Q. East or west of the defective car?

A. It was just a little bit east of the defective car, the other side of it.

Q. Just beyond the defective car, standing still?

A. Yes, sir.

Q. You started with your engine down the siding, did you?

A. Yes, sir.

Q. You were riding on the engine?

A. I was on the steps of the engine.

Q. Then what did you find out?

A. Well, the brakeman got on the front of the engine, that is the pilot.

Q. What is his name?

A. George Chessel.

Q. Where had he been during this last movement?

A. He was cutting the cars off, parting them.

Q. So the crew consisted of Mr. Lang who rode, yourself who handled the switches, your brakeman who cut the cars off
52 and engineer and fireman who operated the engine?

A. Yes, sir, and the flagman.

Q. Where was he?

A. Back at the rear end.

Q. Protecting the train?

A. Yes, sir.

Q. So that he did not have anything to do with this switching movement?

A. No, sir.

Q. He was there to see that something did not come along and run into you?

A. Yes, sir.

Q. So that placed you up on the engine and Mr. Chassel up on the engine. What did you find when you came down there?

A. When we came down where the crippe was, I didn't see him when I went by but the brakeman jumped off the pilot of the engine; seen him standing there; he hollered something; I don't know what it was.

Q. I do not suppose Mr. Spratt wants you to say what was said.

A. Well, I jumped off the train — found him standing there on that footboard.

Q. Were the cars in contact?

A. No, sir.

Q. They were not in contact at that time?

A. No, sir.

Q. How close was the head car of this string that had been kicked in to the defective car at that time?

A. Oh, I don't know; they must have been about two or three feet apart.

Q. Had you heard the cars come together as they had been kicked down there?

A. Yes, sir.

Q. You heard that?

A. Yes, sir.

Q. And was there sufficient space where the drawbar was out and the coupling to permit the coupling and drawbar of the next car to get into that space?

A. Why, it couldn't go in there on account of the sills on the car.

Q. How close could the cars come together?

A. Well they came together so the running boards would meet together.

Q. So that the running boards—

A. Yes, sir.

53 By the Court:

Q. What do you mean by the running boards, the boards on top of the roof?

A. Yes, sir, extends over the top of the car.

Q. The boards that you walk on in going from one car to the other?

A. One car to the other, stepping from one car to the other.

By Mr. Ward:

Q. In the railroad business these running boards are out on top of the car?

A. They are put on top of the car and extend over about seven inches on each end.

Q. So that there is not so big an opening to step over?

A. To step over.

Q. That is provided by the regulations of the railroad Interstate Commerce Commission, as you understand it?

A. Yes, sir.

Q. That they shall project out six or eight inches?

A. Yes, sir.

Q. That is your understanding?

A. Yes, sir.

Q. And these cars were so equipped?

A. Yes, sir.

Q. When the couplers are in proper condition and come together, how much space is there left between the running boards?

A. Just an ordinary step.

Q. Two or three feet?

A. Two or three feet; like you take an ordinary step, about like this (illustrating).

Q. With the cars, in the condition in which they were can the running boards come together?

A. In the condition they were?

Mr. Spratt: I object to that.

Q. Yes.

A. Yes, sir.

Mr. Spratt: Exception. Immaterial, and calling for the conclusion of the witness.

54 Q. And did you see the deceased up on top of the car then?

A. See what?

Q. The dead man, or Mr. Lang.

A. Did I see him?

Q. Was he up there then?

A. Yes, sir. He wasn't on top of the car; he was standing on that step.

The Court: What step?

Q. Now describe that step to us.

A. There is a little step extends out where the brake is on all refrigerators; it is for to set the brake; I suppose that is what it is put there for, to stand on when you set the brake.

Q. That is on the end of the car?

A. End of the car where the brake is.

Q. And is the brake on both ends of one of those cars?

A. No, sir.

Q. Only on one end?

A. One end.

Q. So that to brake that refrigerator car a man had to be on that end?

A. Yes, sir.

Q. And to put the brake on you would step down on a little shelf which is some distance below the top of the car and on the end of the car?

Mr. Spratt: I object to that as leading and suggestive.

Mr. Ward: Well, it is leading but I am only describing what we cannot dispute, either of us.

The Court: Is that the proper description?

The Witness: Of that step?

Q. Yes, sir.

A. Why, the step is put there for—I don't know whether it is for that purpose or not but I can't see anything else it is put there for.

Q. How far below the top of the car is that?

A. If I stand on it, it comes to my knee.

55 Q. About eighteen inches?

A. It is about that.

Q. It is on the side or the end of the car?

A. It extends a little way from the middle of the car and a little way from the end of the car, about in the middle, in between.

Q. How close to the running board that projects out?

A. Well, the same as the running board about like that and that little step like that (indicating).

Q. Three or four inches from the outside of the running board?

A. Something like that.

Q. Does some part of the step project underneath the running board?

A. No, sir.

Q. It comes three or four inches from the edge or the running board?

A. Yes, sir.

Q. Did you get up on top of the car?

A. Yes, sir.

Q. You saw there was some trouble there, I suppose?

A. Yes, sir.

Q. What could you see of this man?

A. Well, I saw him standing there when they stopped the train, got off and I saw that he was hurt.

Q. Did you see any evidence of injury from the ground—could you?

A. Why, from the blood coming from his leg.

Q. Where was his leg?

A. Hanging down like that (illustrating).

Q. Hanging down off the end of that?

A. Off the little step.

Q. How was he supporting himself?

A. He was hanging onto the brake and was facing west.

Q. Facing west hanging onto the brake; that is his back was to the defective car?

A. Back was to the defective car.

Q. Had one foot on this little step?

A. One that was on and the one that was injured was hanging down like that (illustrating).

Q. Which foot was on the step?

A. If I ain't mistaken, I think it was the left, but I am 56 not sure about it.

Q. The other foot was hanging down?

A. Yes, the other foot was hanging down.

Q. What did you do?

A. Well, I got up on top of the car as quick as I could and Mr. Chissel there was up there before I got there.

Q. Climbed up the ladder?

A. Climbed up the ladder.

Q. These cars, I suppose, are 10 or 12 feet high?

A. Oh, yes.

Q. Did you notice the condition of the running boards when you got up on top?

A. Yes, sir.

Q. What did you see about the running boards on this car?

A. Well, I saw the running board, the refrigerator running board was cracked back in the middle of the car; not quite the middle.

Q. What, sir?

A. Kind of cracked, splintered; got heaved up like that (illustrating).

Q. Got heaved up from the end?

A. Yes, sir.

Q. That is the car upon which Mr. Lang was riding?

A. Yes, sir.

Q. Did you notice anything about the condition of the running board on the defective car?

A. I didn't notice any defect there but you could see each mark in between the running boards.

Q. Where the ends had come in contact?

A. No, sir,—where the ends came in contact?

Q. Where the ends came in contact?

A. Yes, sir.

Q. Of the running board?

A. Yes, sir.

Q. Where the running board on Mr. Lang's car had been buckled there?

A. No, sir, not on the end; in the middle of the car.

Q. Shoved back and then buckled up?

A. Struck like that and then heaved up like that (indicating).

Q. Did you notice whether there was any blood or anything of that sort on the ends of that running board?

A. There was no blood there; there was just a little mark there like as if it was caused by something hard in between it.

Q. I think I have asked you this but I want to be sure. If that coupler had been in proper condition could those running boards have come together?

A. No, sir.

Mr. Spratt: I object to that as I did before.

The Court: Yes. I overrule the objection.

Mr. Spratt: Exception.

Q. And how far apart would they have been if the cars had coupled automatically on impact?

A. How far apart?

Q. How far apart would the ends of those running boards have been if the cars had coupled automatically on impact?

A. As I said before——

Mr. Spratt: I object to that as entirely speculative, incompetent, no intention of coupling these cars.

The Court: I think he may testify how far apart.

Q. How far apart would they have been if the cars had coupled on impact, in inches or feet?

Mr. Spratt: Exception.

A. On top?

Q. Yes, ends of the running boards?

A. I should judge about—oh, about a foot.

Q. What did you do with Mr. Lang?

A. Well, we got up on top of the car and I got a bell rope and tied up his leg as quick as we could; had to go to get some blankets, get a rope to wind him in to get him down, called the doctor at

Silver Creek; got my train switched out and got the caboose 58 and went back to Dunkirk as quick as we could.

Q. Was he conscious during that time?

A. Yes, sir.

Q. Appear to be suffering?

A. No, sir.

Q. Well, was his leg broken?

A. Well, I couldn't say whether it was or not.

Q. Did it flop?

A. No, sir; didn't leave it flop; I had him tied up so that it couldn't.

Q. Had him tied up so tight?

A. Yes, sir.

Q. Was the brake set on that car?

A. Yes, sir.

Cross-examination.

By Mr. Spratt:

Q. About what time did this accident happen?

A. 11.25.

Q. That is in the day time, just before noon?

A. Yes, sir.

Q. You say that you had moved this defective car before in the yard?

A. My men had moved it, yes, sir.

Q. And that included Mr.—

A. Mr. Chessel.

Q. Mr. Lang and Mr. Chessel?

A. Mr. Lang and Mr. Chessel, yes, sir.

Q. And at the time they moved it was it defective?

A. Yes, sir.

Q. Was it in the same condition it was at the time this accident happened?

A. Yes, sir.

Q. And was the attention of the crew called to that defective car at the time you moved it out this day before the accident?

A. Yes, sir.

Q. Was Mr. Lang's attention called to it being defective?

A. Yes, sir.

Q. In what way was his attention called to it?

A. We notified—we all understood what we were going to do and about that car being defective was the reason we had to go around the west end to get the other car out.

Q. The ordinary way to get that car out was to take it out, you say, from the—

A. East end.

59 Q. —east end; that is, you would couple to these cars that were ahead of it?

Mr. Ward: Including the defective car.

Q. Including the defective car, and pull them all out to get to the car that was right next west of the crippled car?

A. Yes, sir, to the crippled car.

Q. But instead of doing that, you say on account of the car being crippled there, it was necessary to go in from the west end?

A. West end.

Q. To get this car that you were to take to Farnham?

A. Yes, sir.

Q. And so Mr. Lang was notified of that?

A. Yes, sir, we all had an understanding what we were going to do before we went in there.

Q. Do you know who coupled the engine onto these cars that were on the house track when you started to pull out this one?

A. It was either Mr. Chessel or Mr. Lang, either one of the two coupled it on.

Q. Then after you pulled these cars that were on the house track, that were west of this defective car, and you did the switching with the two cars, cut out two of the cars, and also this one that you were going to take with you, then it became necessary to put the balance, the three cars, in on the house track?

A. Yes, sir.

Q. And you say all that you had to do was to put them in on this house track so that they would be clear of the switch?

A. Of the switch.

Q. About how many cars space was there between this defective car and the switch point west of it before you put in the three cars?

A. From that car up to the switch, do you mean?

Q. Yes, sir.

A. When we went in with the engine?

60 Q. Yes. You said you had to put them in so that the three cars would be clear of the switch point. How far was it from that point of clearance down to where this defective car stood?

A. Well, to get my cars into clear would reach about four or five cars.

Q. But, I mean what space was there? Was there plenty of space?

A. There was plenty of space left after the cars were in there, yes, sir.

Q. You hauled out how many cars?

A. We hauled out six cars.

Q. Six cars you hauled out?

A. Yes, sir.

Q. And three of them you disposed of on other tracks?

A. Two we disposed of on other tracks and three went back on the same track.

Q. And one you took with you?

A. One I took to Farnham.

Q. So that there was additional space at least for three cars on the house track?

A. Two or three cars left over.

Q. So that it was not necessary to come up against the defective car, was it?

A. No, sir.

Q. There could have been a space left between the cars which were put in and the defective car?

A. Yes, sir, could have been.

Q. For at least three car lengths?

A. Yes, sir.

Q. You say that the cars were pushed in or nosed in by the engine just before the accident?

A. Kicked in.

A. What is that?

Q. They were kicked in or shunted in by the engine before the accident?

A. They were kicked in, the three cars was what we call kicked in; just cut the engine loose from the cars.

Q. And the brakeman who gets up to stop those cars, it is up to him to apply the brakes, is it?

A. Well, the way that we always work on the locals, they 61 use their own judgment in riding the cars; that is, what we call riding cars, that is getting on it to stop them; if they think the cars is going too fast, they get on, and if they will use their own judgment and they think it won't do any harm by kicking them in, they don't get on.

Q. Just where they will stop then will depend on how soon or how strong they apply the brakes?

A. Yes, sir.

Q. So that from the speed that these cars were kicked in there, as you saw them, and also from the point where you saw Mr. Lang get on, would there have been any trouble in stopping these three cars before they reached the defective car if you applied the brakes?

A. Well, that would be a hard question to answer. Some men can stop cars quicker than others.

Q. Well, he was a skilled man, was he not?

A. Well, yes, but—

Q. How many years experience to your knowledge had he had as a brakeman?

A. Well, he must have been there six or seven years, something like that; five or six years; four years.

Q. And I understood you to say he understood his business?

A. Yes, sir.

Q. So that it was up to him to apply the brakes as strong or as light as he wished?

A. Well, it was up to him to stop the cars if he could; if he couldn't stop them, he couldn't stop them.

Q. Well, he could see whether he could stop them or not?

A. Well, it was daylight.

Q. And if he saw he was going to run into this other car he could have stepped back, could he not, if he had been watching out?

A. He could if there didn't something happen to him.

Q. Well, I say, if he had been watching?

A. Yes, sir.

62 Q. As I understood you, you and your crew had moved this car on two different occasions before the accident?

A. My crew moved it.

Q. And that included Mr.—

A. Mr. Chesser and Mr. Lang.

Q. On both of those occasions this defect was in the car?

A. Yes, sir.

Q. Was it, so that they could see it?

A. Yes, sir.

Q. State whether they were around that car on both occasions so they could see it?

A. Yes, sir.

Q. Do you know that they did see it, from your conversation with them?

A. Yes, sir.

Mr. Spratt: I understood you to say, Mr. Ward, that the only negligence you claimed was on this defective car?

Mr. Ward: I said the *only defect*.

The Court: The *only defect of the car*, he said.

Mr. Spratt: Yes, I just wanted—

Mr. Ward: That is the *only one* I know anything about. There may have been *some defect* in the brakes. That is up to you to explain; I don't know anything about that.

Q. You say on top of the New York Central car that collided with this car, about the middle of the car the running board had heaved up a little?

A. Yes, it was heaved up. It was cracked but that might have been done before this.

Mr. Spratt: I ask that the latter part be stricken out.

Mr. Ward: I consent.

The Court: Strike it out, if you want to.

Mr. Spratt: Yes; not responsive.

Q. Which you account for by the end boards of these two cars coming together?

A. Yes, that is the only way I could account for it.

63 Q. Looked as though it was a fresh heave?

A. Yes, sir.

Q. That was how far back from the brakes?

A. Oh, it was pretty near the middle of the car.

Q. That would be about how many feet back?

A. Well, about six feet; eight feet; maybe a little more.

Redirect examination.

By Mr. Ward:

Q. Was it the duty of Mr. Lang to prevent the cars from coming together, if possible?

A. Yes, sir.

Mr. Spratt: I object to that as incompetent, calling for a conclusion.

The Court: He may answer.

Mr. Spratt: Exception.

Q. I understood you to say in answer to Mr. Spratt's question that it was left to these men, if they thought the cars were going too fast, then they got on and tried to stop them?

A. Yes, sir.

Q. If they were not going fast enough to do any harm, they did not get on?

A. No, sir.

Q. When you saw Mr. Lang get up on this car what did he start to do right off?

Mr. Spratt: I object to that as leading and suggestive.

The Court: Did you see?

Q. Yes; if you can tell me what he did start to do when he got up there?

A. I didn't see him when he was on top of the car; I saw him getting on the car.

Q. Oh, you didn't see him?

A. I didn't see what he done; I saw him getting on the car.

Q. Do you know anything about the condition of the brakes on that car or string of cars?

A. No, sir.

64 Recross-examination.

By Mr. Spratt:

Q. Those cars that you took out from the siding were not in your train?

A. No, sir.

Q. And you only had charge of them while you were making that switching movement?

A. Yes, sir.

Mr. Spratt: That is all.

Adjourned until tomorrow morning, Tuesday, June 11, 1918, at 10 o'clock.

Tuesday, June 11, 1918.

GEORGE ERNST, was recalled as a witness in behalf of the plaintiff and testified on further cross-examination by Mr. Spratt as follows:

Q. Was it the intention of your crew to couple onto this defective car?

A. No, sir.

Q. Was it the intention to move or change this defective car in any way?

A. No, sir.

Mr. Spratt: That is all.

ANNA E. LANG, the plaintiff, was called as a witness in her own behalf and having been duly sworn testified on direct-examination by Mr. Ward as follows:

Q. You are the widow of the late Oscar C. Lang?

A. Yes.

Q. What was your husband's age at the time of his death?

A. Forty years old.

Q. What is your age?

A. Thirty-eight this month.

65 Q. When were you married?

A. Twenty years ago in February.

Q. Where did you live at the time of your husband's death?

A. Buffalo, N. Y.

Q. Whereabouts in Buffalo?

A. 110 Aldrich Place, South Buffalo.

Q. During your married life what business had your husband been engaged in?

A. Why, in our early married life he was in business.

Q. He was what?

A. In our early married life he was in business; he was a meat cutter by trade and then we sold that out; it wasn't paying; and Mr. Lang then worked here for a man by the name of Valentine for a short time.

Q. In the meat business?

A. Yes. And after that he worked for the International Railway Company a short time; then went for the New York Central, which would be eleven years last August.

Q. Went to work for the New York Central?

A. Lake Shore, rather.

Q. And did he work with them continuously from that time up to the time of his death?

A. Always; he never lost a day.

Q. What wages was he receiving shortly before his death?

A. Why, as near as I can remember, his wages would amount to from about a hundred to a hundred and ten; sometimes he averaged one hundred and twenty for the month.

Q. Running from a hundred to a hundred and twenty a month?

A. Yes.

Q. What did he do with his money?

A. Gave it all to me.

Q. What did your family consist of?

A. Raymond, thirteen; Dorothy, four; and John, two.

Q. Are these the children here (indicating)?

A. These are the children.

Q. Are they healthy children?

A. Practically, yes.

66 Q. Did you or your husband have any means of support for yourself or your family except your husband's labor?

A. No.

Q. Have you got any trade or business or——

Mr. Spratt: Objected to as incompetent, irrelevant and immaterial. Exception.

A. No, I never worked a day in my life outside of taking care of my family.

The Court: You object, Mr. Spratt?

Mr. Spratt: Yes.

The Court: Sustain the objection.

Q. Did these children reside with you and your husband up to the time of your husband's death?

A. Always.

Q. Were they supported by the money which your husband gave you?

A. Absolutely.

Q. What was the first you knew of your husband's accident?

A. Why, some man 'phoned me over my telephone.

Q. Did you go to Dunkirk?

A. Immediately.

Q. The accident happened about twelve o'clock on Thursday, I think.

A. Yes, about noon.

Q. And you got to Dunkirk about what time?

A. I couldn't reach there until four o'clock; we were delayed; the train was delayed very much on the way.

Q. Four o'clock on the same day?

A. Yes.

Q. Was your husband conscious?

A. He was, yes.

Q. Did he talk with you?

A. Yes, he said a few words.

Q. Did his twin sister Mrs. Johnson reach there?

A. The next morning at eight.

Q. Did he talk to her?

A. Yes, he greeted her.

Q. When did he die?

A. Half past five the following Saturday.

67 Q. Did he talk to you on Saturday?

A. Yes.

Q. Your oldest boy, did he talk to him?

A. Yes.

Q. Was his conversation intelligent so that you could understand what he was saying and he understand you?

A. For a few moments time, then he would become unconscious again.

Q. Did he appear to be suffering pain?

A. Not until the last afternoon, then he suffered intense pain.

Mr. Ward: Is it admitted he died as a result of the injury?

Mr. Spratt: Yes.

Mr. Ward: Mr. Spratt says it is admitted that he died as a result of the injuries he received on Thursday. I think under the

Federal Law you cannot prove funeral expenses, your Honor. Is there any more recent decision on that point your Honor is familiar with?

The Court: Not to my knowledge.

Mr. Ward: I know it was originally decided we could not prove funeral expenses under the Federal Act, so I won't prove them.

Q. What state of health did your husband enjoy before his death, Mrs. Lang?

A. He was always healthy.

Q. Did he work steadily?

A. Very steadily.

Q. Where do you live now?

A. 132 Lancaster Avenue.

Q. Before your husband's death, during his employment by the New York Central, how much time would he be home?

A. Why, sometimes he would be in—on the wayfreight, of course, the time is different; he would be in just over night; he would get in—they were supposed to always get in in the morning but they never do as a rule and he would not get home
68 much before seven or eight o'clock at night at that time, and he would go at five in the morning; somewhere around there.

Q. Well, was that a regular thing or was that only part of the time?

A. Always, on the wayfreight, as a rule.

Q. Well, did he have days off when he was at home?

A. No. You see, the opposite days were spent at Erie, Pa., that was the end of the line.

Q. Did he do anything around the house?

A. Yes; he was a wonderful man; he had a wonderful garden and lovely chickens and was very helpful to me.

Q. Did your husband make a garden?

A. Yes, every bit of it.

Q. And that helped feed the family?

A. Very much.

Q. Have you been doing that for—

A. For the last two years—three years I should say; going into the third year.

Q. I suppose the only one of your children that was in school at the time of your husband's death was the oldest boy?

A. Raymond, yes.

Q. What school was he going to?

A. 29 in South Park; he now goes to 56.

Q. Public school?

A. Yes.

Q. The other children are not old enough to go to school?

A. No. Dorothy is four; John is two.

Mr. Ward: You may ask.

Mr. Spratt: I have no questions.

Mr. Ward: I offer in evidence the Carlisle Tables of Expectancy showing the expectancy of the deceased at forty years to be 27.61 years.

I ask leave to amend the complaint to accord with the proof offered, to allege that the deceased—in paragraph 10 to add to the paragraph the following: "That the plaintiff as widow 69 and the three children were dependent on the deceased for their support."

Mr. Spratt: I object to that as incompetent—

Mr. Ward: Just wait until I finish it, Mr. Spratt.

Mr. Spratt: Yes.

Mr. Ward: "—and have been damaged by the loss thereof." The pleadings are in the state form and I simply make this formal technical amendment to comply with the decision that I noticed in the United States Court, which I do not think would be binding upon these courts because I suppose our own form of pleadings govern, but nevertheless I make that amendment to be on the safe side, as this is a very important case.

The Court: I will permit it.

Mr. Spratt: I object to it as incompetent and improper and another and different cause of action, and take an exception to the granting of the amendment.

Mr. Ward: That is our case.

Mr. Spratt: If the Court please, on behalf of the defendant the New York Central I move for a non-suit upon the ground that the plaintiff has failed to establish any cause of action against the defendant under the Federal Employers' Liability Act or under any other law and has failed to establish the cause of action alleged in the complaint; that no actionable negligence has been established against the defendant; that as a matter of law under the undisputed facts plaintiff's intestate assumed the risks and dangers of his employment and the risk of being injured in the manner in which he was; and that actionable negligence, if any is shown on the 70 part of the defendant, is not shown to have been the proximate or a contributing or concurring cause of his death; that the plaintiff's intestate is not shown to have been in a situation where the defect or absence of the drawhead coupler or drawhead operated in any way as a breach of duty imposed for his benefit.

There are a couple of cases I want to show your Honor; would you give me just a little time to get them? I am going to call up my office, and I ask one of the attendants to get me 238 U. S., page 243.

The Court: Mr. Ward furnished me with a brief in another case, the Kimball case, where that case is discussed and been quoted from, so I think I know something about that case.

Mr. Spratt: I will get this other case, this Devens case.

The Court: What is the holding in the Devens case?

Mr. Spratt: Was that he assumed the risk in riding upon this car.

Mr. Ward: That was not under the Safety Appliance Act, Mr. Spratt.

Mr. Spratt: If your Honor please, the distinction in this case is

that the accident in question is not under the Safety Appliance Act, because the car in question was not used nor was it intended to be used at the time in question in connection with the movements of this train. The car was standing there and the evidence was that they simply moved the cars away from it where it was, the car that was not connected with it, took that car out and afterwards returned the other cars, not intending to couple up or use these cars in connection with each other at all. So that I say the question of
71 the Safety Appliance Act is not in this case and it comes squarely under the Conarty case, which has not been overruled in any phase of the case under discussion.

The Court: Let me see the decision you have sent for first.

Mr. Spratt: It was the case of Bolt against Pennsylvania R. R.

Mr. Ward: That is not under the Safety Appliance Act.

Mr. Spratt: I say that that applies to that branch of when he was riding upon the car; I say that the Safety Appliance Act has no application to the case at issue here.

Mr. Ward: This authority did not pass on that question because there was not any question of the Safety Appliance Act involved in the Bolt case, as I understand it; it was a question of the Employers' Liability Act, and the Court simply passed on the charge of Judge Hazel as to the question of assumption of risk which, of course, remains under the Employers' Liability Act but is expressly removed under the Safety Appliance Act. I only mentioned that it did not seem to me this authority he had would affect this case.

The Court: As far as a man was riding on the engine.

Mr. Spratt: Yes, sir; this man was riding on the car; there is no difference.

The Court: They said he had nothing to do with the management of the train. In this case he was performing his duties.

Mr. Spratt: He was a member of the engine crew. I will just read that to you so that you will see. It says: "Where a duty is imposed for the protection of persons in particular situations or
72 relations a breach of which happens to result in injury to one in an altogether different situation or relation is not, as to him, actionable. * * * The evils against which these provisions of the Safety Appliance Act are directed are those which attended the old fashioned link and pin couplings where it was necessary for men to go between the ends of the cars to couple and uncouple them. * * * It was not intended to provide a place of safety between colliding cars, * * * and an employee of a railroad company not endeavoring or intending to couple or uncouple the car or to handle it in any way, but in riding on an engine that collided with it, is not in a situation where the absence of a coupler and drawbar prescribed by the Safety Appliance Act operates as a breach of duty imposed by that Act for his benefit."

That case, the Conarty case, and the case at bar are as near alike as you could possibly get two cases.

The Court: Of course, in the Layton case the Supreme Court used other language.

Mr. Spratt: The distinction between those two cases, in that case

they attempted to couple together two cars and the cars did not couple, the result being it drove these cars down that did not couple and ran over a man who was down at the other end.

Mr. Ward: Oh, no; they struck some other cars.

Mr. Spratt: Put in motion some other cars and the man was farther down and the accident arose. That arose from defective couplers and the cars were in active use. Here is nothing of that kind; this car was not in active use.

The Court: Of course in this Layton case the Court used this language:

73 "While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employes who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to protection of employes only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employes for failure to comply with the law springs from its being unlawful to use cars not equipped as required,—not from the position the employe may be in, or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employes in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of injury to them when engaged in the discharge of duty. The jury found that the plaintiff's case came within this interpretation of the statute, and the judgment of the Supreme Court of Georgia must be affirmed."

Mr. Spratt: That was where, as I say, the cars were engaged in active interstate commerce.

The Court: I will deny your motion now and hear what you have to say.

Mr. Spratt: Exception.

74 MARTIN CULLIGAN was called as a witness in behalf of the defendant and having been duly sworn testified on direct-examination by Mr. Spratt as follows:

Q. Where do you live?

A. Dunkirk, New York.

Q. You are in the employ of the New York Central?

A. Yes, sir.

Q. Were you in the employ of the New York Central?

A. Yes, sir.

Q. Were you in the employ of the New York Central at the time of this accident?

A. Yes, sir.

Q. In what capacity?

A. General foreman.

Q. Did you hear of this accident?

A. Why, I did shortly after it occurred; I received a message

from the superintendent to go to Silver Creek and make an inspection of the car.

Q. Has it been your duty for some time to inspect cars?

A. Yes, sir.

Q. How many years' experience have you had in that?

A. Twenty-three years.

Q. You went to Silver Creek?

A. Yes, sir.

Q. What day was it you went there?

A. To the best of my recollection it was on the third day of November. I didn't bring any—not knowing what I was coming for, I didn't bring any notes with me.

Q. How many cars did you inspect there?

A. Inspected two.

Q. What were those cars?

A. One was refrigerator and the other was a box car.

Q. You remember the number of the New York Central car? Did you hear it mentioned here as being one of the cars?

A. I believe I did. I think it was one 45285 or something like that.

Q. 152—

Mr. Ward: No, no; let him tell; this is important; he is the inspector.

75 Q. Have you got it there?

A. 152485 New York Central; I think that is as near as I can recall it; and the other was 2936 A. & W. P., Atlantic & West Point.

Q. What inspection did you make of those cars? For instance, take the first one you mention, the New York Central?

A. Made a general inspection.

Q. What do you mean by general inspection?

A. Covered the whole car, safety appliances and including running gear, condition of roofs, side doors, coupler and attachments, heights, etc.

Q. Brakes?

A. Yes, sir, so far as I was able.

Q. What did you find the condition of this New York Central car to be?

The Court: Is that the refrigerator car?

The Witness: Yes, your Honor.

Q. That is the refrigerator car?

A. To the best of my recollection.

Q. To the best of your recollection—

A. I found that the center running board had been shoved back so that where it joined onto the saddle about fifteen feet back it was raised up, and there was a nick in the center running board where it came in contact with something, some other car.

Q. Was the break, was this raising fresh, or what was it?

A. It was apparently a new break. Of course, it was two or three days after the accident occurred that I inspected it.

Q. And outside of that what did you find with reference to this car?

A. Nothing. The car was practically a new car.

Q. When you say "nothing," what do you mean?

A. There was no other damage done outside of,—well, that running board, of course, was splintered; I don't just remember
76 how far back it was splintered, where it had been jammed and shoved up.

Q. How were the brakes?

A. The hand brakes were all right. I was unable to make any test of the air, not having any power.

Q. That is, to make a test of the air you would have to have an engine?

A. Yes, sir.

Q. The testimony here is that at the time of the accident no engine was attached to the car.

A. Well, not when I made an inspection.

Q. Well, I mean the testimony here is that at the time of the accident there was no engine attached to the car.

A. Oh, I see.

Q. So that you examined under those same conditions?

A. Yes, sir.

Q. On the box cars or other cars, how many brakes or brake wheels are placed on them?

A. One.

Q. It is either one end or the other?

A. Well, there is a law; it is always on what they call the "B" end.

Q. That is where the cars are designated as "A" end and "B" end?

A. Yes, sir.

Q. And the end where the brakes are placed is called the "B" end?

A. The "B" end.

Q. Who was with you when you made your inspection?

A. Well, one of my inspectors, Mr. Hassett.

Q. Did you make an inspection of this other car, this A. & W. P. that you have spoken of?

A. Yes, sir.

Q. What did you find with that?

A. I found on the brake end of that car that the coupler was missing, both draft timbers were damaged, one of them, the rear one, was left on the axle and all the bolts were broken; the carrier iron bolts that holds up the coupler had pulled through the head block; and the brake shaft was so badly bent that we were unable to
77 make any test of the hand brake on it.

Q. Were these defects that you speak of plain?

A. Yes, sir.

Q. They could be seen by anybody?

A. Yes, sir.

Q. What distance away in daylight?

A. Well, I presume from eyesight that you could detect that quite a ways away if there was no obstructions in front of the car.

Q. Yes, assume there were no obstructions, how far could you see?

A. Well, they were plain.

Q. About how far away could you see them?

A. Oh, I imagine a person could see it for maybe a hundred yards.

Cross-examination.

By Mr. Ward:

Q. You did not test the brakes on this car, the first one that you spoke of, while it was in motion, did you?

A. The refrigerator car?

Q. Yes.

A. No, sir.

Q. It was standing still?

A. Yes, sir.

Q. So that whether the brakes actually would brake the car or not you could only tell by such examination as you could make of it while the car was standing still?

A. That was all I could tell by bringing up the brake to the wheels and releasing them.

Q. You had no chance to see whether they would work in motion?

A. I couldn't tell.

Q. The absence of this coupler on the defective car, did that permit the ends of the cars to come closer together than they otherwise would?

A. Yes, sir.

Q. Would it permit the ends of the cars to come so close together that the ends of the opposite running boards would touch?

A. Yes, sir.

Q. If the coupler had been in position on the damaged car,
78 how much space would there be between the ends of the running boards?

A. Well, now, they vary; they go from 10 inches sometimes to 14 and 15.

Q. From 10 to 14 or 15?

A. All depends on the height of the cars; they vary; two cars of the same heights vary; but from 10 to 14 inches.

Q. So that in all cars it is not less than 10 and more than 14 inches space between them if they got couplers on?

A. Well, they might, I say, if the cars were evenly built.

Q. Were these cars?

A. Well, one of them was—the refrigerator car measured from top of rail to the running board 10 ft. 7 $\frac{1}{2}$, and the A. & W. P. measured 9 ft. 3. That is the way we take our inspection, from the height of the rail to the running board—or not the running board but the brake step board.

Q. So that these running boards on these two cars would not have come together?

A. No, sir; one would come under the other.

Q. Then the running board on the refrigerator car was the highest?

A. Yes, sir.

Q. And what did that strike when it came up against the other car?

A. I couldn't tell you.

Q. How close together would the ends of the cars come?

A. The ends of the cars?

Q. Yes, sir, with that drawbar out, the coupler out?

A. Why, I imagine that it would come only to the end of the step board, the brake step board.

Q. Only to the end of the brake step board?

A. I imagine it would be on account of the coupler being missing and the other car being lower.

Q. So that the brake step board would come right up against the end of the other car?

A. Yes, brake step board of the refrigerator would come up against the end of the car, of the A. & W. P.

79 Q. And in ordinary operation when both couplers were in, they would be how far apart?

A. Well, now, they would run about 30 inches; Safety Appliances requires 12 inches of a clearance in both cars; that is, wide enough for a man to go through, and then there is the horn of the coupler amounts to about three inches back of it; about thirty inches there is a clearance between cars when they are coupled.

Q. And the way these cars were it would permit the brake step board to come right up against the end of the car?

A. I imagine that is right; they were half a mile apart when I made the inspection.

Q. Did you see any blood marks there?

A. I recollect one of the men pointed out that there were some blood marks on the top part of the coupler.

Q. That is about underneath the brake staff.

Redirect examination.

By Mr. Spratt:

Q. From the inspection that you made there with reference to the brake on the New York Central car and the way in which it handled, the wheel you could tell could you not, whether it would apply in a proper manner in case the car was in motion?

A. I should judge that it was in good working order.

Q. From your inspection and experience, that is all?

A. That would be my opinion, that it was in proper working order.

Q. Of course cars are of different heights, are they not?

A. Yes, sir.

Q. Some are—

A. Some are higher than others.

Q. From a flat car up to the highest automobile?

A. Yes; furniture cars and—

Q. So they come in all sizes?

A. They do, they come in all sizes; some ten, some twelve feet.

Mr. Spratt: That is all.

80 TIMOTHY HASSETT was called as a witness in behalf of the defendant and having been duly sworn testified on direct-examination by Mr. Spratt as follows:

Q. You were the one who went with the previous witness and made an inspection of this car?

A. Yes, sir.

Q. You are an inspector?

A. Yes, sir.

Mr. Spratt: Mr. Ward says there is no question about it.

Q. Did you find the same condition—

A. Same condition.

Q. —that existed there as testified to by the preceding witness Mr. Culligan?

A. Yes, sir.

Mr. Spratt: I offer this little sketch in evidence.

The sketch referred to was received in evidence as Defendant's Exhibit A.

Mr. Spratt: That is all.

Mr. Ward: No questions.

Mr. Spratt: The defendant rests.

Mr. Ward: No rebuttal. I will offer my letters of administration in evidence, dated the 13th day of November, 1917, appointing Anna E. Lang administratrix of the estate of Oscar C. Lang, issued by the Surrogate of Erie County.

The Letters of Administration referred to were received in evidence and marked Plaintiff's Exhibit 1.

Mr. Spratt: If the Court please, I move for the direction of a verdict on the same grounds I moved for a non-suit; upon the further grounds it now appears that the car in question which plaintiff's intestate was riding at the time of the accident, being

81 New York Central refrigerator car 152485, was in good condition at the time this accident happened; that the brakes and appliances were in good working order; upon the further ground that it is shown that there is no negligence whatever on the part of the defendant and that there is negligence and proximate negligence which caused or contributed to causing the accident on the part of the plaintiff's intestate, and that the negligence of the plaintiff's intestate was the sole, proximate and only cause of his death.

The Court: Well, now, there may be a question of law involved here such as you raise. I appreciate the point that you suggest. The Supreme Court of the United States has gone so far in these

classes of cases I feel that I have got to deny your motion and, subject to review, you know, if necessary, I will hold—which will probably be the best disposition for you—that liability has been established and it is only a question of damages.

Mr. Ward: I did not catch that, your Honor.

The Court: That liability has been established under the Safety Appliance Act and that it is only a question of damages. You want an exception?

Mr. Spratt: Yes.

Mr. Ward: Your Honor rules liability has been established?

The Court: Yes.

Mr. Spratt: Absolute liability?

The Court: Absolute liability, I assume there is no dispute over the question but what the plaintiff's intestate was injured by the coming of these cars together practically in the manner described by the witnesses. Of course the evidence shows that he knew and was told that that was a damaged car and the couplers were out of order, had been taken away, were gone, and, of course, to that extent you might say that, except for the Safety Appliance Act he would assume the dangers incident to the operation that was being done there. I do not see there is any evidence of any defect in the refrigerator car that he was riding at the time that he was hurt. But for the present I am going to hold it is simply a question of damages, the extent.

82 Mr. Spratt: Comes solely under the—

The Court: Puts the question right up square, you know.

Mr. Spratt: You hold it is a Safety Appliance Act case?

The Court: Yes.

Mr. Spratt: Exception.

The Court: And, of course, I suppose it will be the duty of the jury to apportion the damages too under the Act.

Mr. Spratt: Yes, that of course I take exception to.

The Court: I just mentioned that so that you may be guided in your remarks to the jury.

Mr. Spratt for the Defendant and Mr. Ward for the Plaintiff summed up the case, after which the Court charged the Jury as follows:

Charge of the Court.

Gentlemen of the Jury:

The Court, in interpreting the law governing this case, has reached the conclusion that the plaintiff has made out a case of liability of the defendant and the only question for you to determine is the amount of damages. Nevertheless, it may be of interest to you as jurymen to know how this case differs from a great class of other cases which you have from time to time as jurymen to consider. The Constitution of the United States has conferred upon Congress the right to regulate commerce between states and in pursuance

83 of this general power conferred by the Constitution Congress has enacted certain laws relating to railroads running from one state into another, who actually are our agents in interstate commerce. Among other acts that they have passed is what is known as the safety appliance act relating to the equipment of cars and trains engaged in interstate commerce, transportation of passengers and freight from one state to another.

I will now read you some of the provisions of one of those acts. Section 2 of what is commonly known as the safety appliance act provides that "it shall be unlawful for any such common carrier," that is, one engaged in interstate commerce, "to haul or permit to be hauled or used in its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, which can be uncoupled without the necessity of men going between the ends of cars." And Section 5 of this act provides that "after July 1st, 1895, no cars, either loaded or unloaded, shall be used in interstate commerce, which do not comply with the standard above provided for." Section 8 of the act provides that "any employe of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive or car or train has been brought to his knowledge." Then the Federal Employers Liability Act further provides that "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the

84 employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: Provided, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

It is undisputed that a car with the coupler damaged was placed on what is known as the house track of the defendant's railroad at Silver Creek and that this coupler had been so injured that it had to be taken out; at the time of the accident there was no coupler at all or drawbar on the end of this car; and this car stood in on this track with some others, one or more of which the Company desired to take off the track and to put into the train which was picking up freight cars along the line, and in so doing they hauled out one car and then had to kick back or put back other cars onto the house track again.

In so doing the switch was turned and, I think, at the time three cars were, as they say, kicked by the engine moving them onto this house track. They had a little distance to run down to the place where they were to be stopped and Mr. Lang, the plaintiff's in-

testate, was a brakeman, one of the crew of this local freight train. It appears it was his duty and it was the custom for him, where it was necessary, to climb to the top of these cars as they moved along on this track and, where necessary, to set a brake to stop them at the proper point, and that on the day in question he climbed up onto what is known as a refrigerator car and had hold of the brake, was standing on the foot rest or foot platform, connected with the brake. He did not succeed in stopping the car, either on account of his own lack of care or the force with which it was
85 backed in there, or for some other reason—it is not material now anyway—and the refrigerator car came into contact with the freight car with the coupler gone and the result of it was that the ends of the two cars came together and his leg was so crushed that two or three days after he died as a result of the injuries.

Under the provisions of these sections of this act which I have called your attention to, you see, it is expressly provided that even though the injured party who has lost his life has been guilty of contributory negligence, that does not preclude a recovery on his part or on the part of his representatives, nor is he deemed to have assumed the risk incident to it. Remember in this case the plaintiff's witnesses testified that Mr. Lang was told that there was that car without couplers on it but by the express provisions of the act he would not be deemed to have assumed the risk of operating it, so I have reached the conclusion, for the present any way, that the only question for you to determine is the amount of damages which his family has sustained by reason of his death. So eliminate all of these other questions from your consideration and get right down to the single question as to the financial loss which his wife and children have suffered by reason of this accident.

You are to take into consideration his earning capacity, what he actually was earning at the time of his death, how much he contributed to his family, how much of those earnings, in the natural course of things, he would require for his own personal expenditures, because, of course, he had to be clothed. I suppose certain expenses probably of food and other things were incident to his daily life. Then you are to take into consideration his expectation of life, the number of years which in the ordinary course of events he would naturally be expected to live. Of course, he might
86 die tomorrow or he might live beyond the probable expectancy which has been read. That is given to you as a guide, however, in determining what in the ordinary course of events a healthy man would be expected to live. Then you are to determine as best you can from all this data the amount of financial support which in the ordinary course of events the husband would have contributed to his family. I have this thing, however, to caution you against: You cannot capitalize your verdict. Just for illustration, not by way of any guide here, we will say a man earns a thousand dollars a year. We will say his expectancy is 20 years. You should not multiply a thousand dollars by twenty and render a verdict therefor for twenty thousand dollars, because you can see if

twenty thousand dollars were paid at the going rate of interest of, say, five per cent, the interest itself on the twenty thousand dollars would yield a thousand dollars a year which he was earning and at the end of the beneficiary's life you would not only have a thousand dollars a year but you would have the twenty thousand dollars in addition. That would be what I term capitalizing the verdict. But you are to render such a verdict by way of dollars-and-cents that in the long run, taking all these matters into consideration, would compensate those who have sustained damages by his death for his death. And that you will have to arrive at as best you can as business men and men of common sense. Of course, counsel and advice of the father to his children is also to be considered in determining the amount of the loss. You should take into consideration, of course, the possibility that the children might not survive childhood, that they may die before reaching manhood and womanhood.

All these things have got to be taken into consideration and
87 then you reach a verdict which you think is fair and just in
this case.

Under this Federal law you are to apportion the damages. There are four persons interested in the outcome of this litigation. There is the widow and each of the three children varying in ages, the boy being thirteen, if I remember right, something like that, the little girl of four and the youngest child two. Therefore you will determine the extent of the damage to each one of these people. I have drawn for your guidance a form of verdict which I wish you to render. You say that "the jury say that they find a verdict for the plaintiff in the sum of (blank) dollars and apportion said damages as follows, to wit, to Anna E. Lang, widow, (blank) dollars; to Raymond J. Lang, son, so much; to Dorothy M. Lang, daughter, so much; to John A. Lang, son, so much." Of course, I have arranged them in the order of their respective ages Mrs. Lang being at the top and the oldest boy next and the daughter who is four next and John A. Lang, the infant son of two, next. Therefore the total amount of your verdict, whatever it may be, should be first inserted in that blank; then you apportion it among the different parties interested as you think is right and just.

That is all I have to say to you, gentlemen, in this case.

Mr. Ward: May I ask your Honor to charge the jury that in fixing the loss to the family they may allow for the value of any services which the deceased would render his family apart from his wages?

The Court: Yes, that is true.

Mr. Spratt: Exception.

Mr. Ward: And I also ask your Honor to charge the jury that in fixing the damages and loss to the family they have a right
88 to consider any prospect of advancement or increased earning capacity which the deceased might have.

The Court: Of course, anything reasonable.

Mr. Ward: And I ask your Honor to charge the jury that in fixing the damages to the family they must consider solely the evidence here presented and that the verdict should not be reduced

or diminished because of any idea that the jury might have that it could be more readily collected.

The Court: Surely. That is not for you to concern yourself with.

Mr. Spratt: Exception to each of the requests and direction. Of course, I take an exception to the submission to the jury of any question of the defendant's negligence and ask the Court to charge the jury that under the facts in this case the defendant is not shown guilty of any actionable negligence.

The Court: Well, I have already ruled on that. Of course, that is to save your exception.

Mr. Spratt: Yes.

The Court: And I decline the request.

Mr. Spratt: Exception. I take an exception to your Honor's charge that the plaintiff's intestate is not deemed to have assumed the risk.

I also take exception to your Honor's charge that even though the plaintiff's intestate was guilty of negligence he could recover under the Safety Appliance Act.

The Court: That is all involved in your motion for dismissal.

Mr. Spratt: I except to the submission of any other question of negligence to the jury.

The Court: I did not submit any.

Mr. Spratt: No. You have taken it all away. That can go out, I think.

I ask the Court to charge the jury that if they find that the car in question had been placed in the position in which it was at the time of the accident for the purpose of being unloaded and that if they find that the train crew were not attempting to couple onto the car in any way or handle it in any way, that the defect in or absence of the prescribed coupler and drawhead did not operate as a breach of any duty imposed for the benefit of plaintiff's intestate under the Safety Appliance Act and that no recovery can be had merely because the coupler or drawhead was defective.

The Court: I will decline your request.

Mr. Spratt: I ask the Court to charge that under all the circumstances in this case plaintiff's intestate assumed as a matter of law the risk of the cars upon which he was riding coming in contact with the standing car in question.

The Court: Denied. Give you an exception.

Mr. Spratt: Exception. I ask the Court to charge that if there was no breach of duty imposed for the benefit of plaintiff's intestate under the Safety Appliance Act the jury may find plaintiff's intestate assumed the risk of all dangers open and obvious and known to him, whether such risks followed from a failure to have in force a rule or rules or from the negligence of his employer or fellow servant.

The Court: Of course, if there was no violation then it would be true but I have held there was. I give you an exception.

Mr. Spratt: Exception. I ask the Court to charge that if the plaintiff's intestate knew of the location of the car in question and

knew that the coupler or drawhead on the same was defective that he assumed, as a matter of law, any risk arising from riding the cars in question in there on the track upon which such defective car stood and that there can be no recovery in this case.

The Court: I will decline the request.

90 Mr. Spratt: Exception. I ask your Honor to charge that the plaintiff's intestate assumed the risk of the cars being kicked into the siding with sufficient force to require the setting of brakes to prevent them coming in contact with other cars standing on the siding.

The Court: I will deny the request; and give you the exception.

Mr. Spratt: Exception. I ask the Court to charge that under the facts shown the plaintiff intestate's failure to set the brakes and hereby prevent the cars coming into collision with the standing car in question was the sole proximate cause of the accident, which bars a recovery.

The Court: I will deny your request and give you the exception.

Mr. Spratt: Exception. I take exception to your Honor's ruling that the damages may be apportioned between the widow and the children and ask your Honor to charge the jury that the verdict must be one for one amount.

The Court: I will deny the request.

Mr. Spratt: Exception.

At 11:55 A. M. the jury retired for deliberation, returning into the court room with a verdict for the plaintiff in the sum of \$18,000 apportioned as follows: To Anna E. Lang, widow, \$7,000; to Raymond J. Lang, son, \$2,500; to Dorothy M. Lang, Daughter, \$4,000; and to John A. Lang, son, \$4,500.

The foregoing is all the evidence taken and proceedings had upon the trial of this action, and because the same does not appear of record the defendant has caused the foregoing case and exceptions to be prepared to the end that this case may be further considered by this court.

LOCKE, BABCOCK SPRATT &
HOLLISTER,
Attorneys for Defendant.

It is hereby stipulated, that the foregoing case containing all the evidence taken and proceedings had upon the trial of this action may be settled, signed and ordered filed, by the justice before whom the same was tried, and that the same was tried, and that the same shall stand for all purposes as the original case herein.

It is further stipulated, that the above notice of appeal, judgment roll, case and exceptions, and order denying motion for new trial are true and correct copies of and from the originals thereof, entered and remaining on file in Erie County Clerk's office and certification of the same is hereby waived.

It is further stipulated, that the exhibits used, on the trial of

this action, may be used upon the argument thereof with the same force and effect, as though printed and made a part of this record.

Dated, November 4th, 1918.

JULIUS A. SCHREIBER,

Attorney for Respondent.

LOCKE, BABCOCK, SPRATT &
HOLLISTER,

Attorneys for Appellant.

Opinion.

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix, Plaintiff,
against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

Motion by defendant for a new trial after a verdict for the plaintiff.

Maurice C. Spratt for defendant.

Julius Schreiber for plaintiff.

WHEELER, J.:

The plaintiff's intestate was a trainman engaged in interstate commerce as one of a train crew operating a wayfreight train between Erie, Pennsylvania and the City of Buffalo, New York. The cause of action is based upon an alleged violation of the Act of Congress known as the Safety Appliance Law.

The defendant had a loaded car loaded with iron which had been placed on a siding at the station at Silver Creek, New York. On the same track was also standing another car destined for Farnham, the next station east. At Silver Creek this wayfreight had orders to leave a couple of cars and to take on the car going to Farnham. The car loaded with iron above referred to was defective. The draw bar, the draft timber and the coupling apparatus on the westerly end of this car were gone. This car had been on the siding at Silver Creek several days loaded with iron consigned to a firm at Silver Creek, waiting to be unloaded. Its condition was known to the crew of the wayfreight generally and to the plaintiff's intestate prior to the accident. In fact its crippled condition was the subject of conversations between him and the train conductor only shortly before the accident happened. In getting out the car for Farnham the engine went onto the siding from the westerly end, pulled out a string of six cars including the Farnham car, then shunted the Farnham car onto an adjoining track, placed two of the other cars they had hauled out onto a third track, and then kicked the other three cars back onto the track where the crippled car stood. Plaintiff's intestate

was on one of these three cars for the purpose of setting the brakes and so placing them on this siding so as not to come into contact with the crippled car. He evidently was at the brake on the easterly end of the easterly one of the three cars moving toward the crippled car. His foot was resting on the small platform at the end of the car just below the brake wheel. For some reason he did not stop the three cars moving on this track before the cars came into contact with the crippled car. The cars collided, and owing to the absence of the coupler attachment and bumpers on the crippled car intestate's leg was caught between the ends of the two cars and he was so injured that he died from the injuries so received.

It evidently was not the intention of any of the crew to disturb, couple onto, or move the crippled car. The defendant contends that it is not liable for the accident; that the plaintiff, under the circumstances of the case is not entitled to invoke the provisions of

the Safety Appliance Act of Congress, and that the accident was caused solely by the negligence of plaintiff's intestate in neglecting to properly brake the cars on which he was riding at the time of the accident. At the trial the Court took the view that the accident was due to the failure of the defendant to comply with the Federal Statute, that the liability imposed was an absolute one, and a case had been made out within the statute, and the only question remaining was for the jury to fix the amount of the damages sustained.

The jury accordingly found for the plaintiff, assessing the damages as follows to

Anna E. Lang, Widow.....	\$7,000.00
Raymond Lang, Son.....	2,500.00
Dorothy Lang, Daughter.....	4,000.00
John A. Lang, Son.....	4,500.00
In all.....	<hr/> \$18,000.00

A motion is now made for a new trial in which the trial court is asked to review its rulings.

The defendant contends that upon the undisputed facts the plaintiff's intestate and his representative cannot invoke the provisions of the Safety Appliance Statute relating to car couplers.

The Safety Appliance Act provides:

(Section 2) "It shall be unlawful for any such common carrier (one engaged in interstate commerce) to haul, or permit to be hauled or used in its line, any car, used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 5 of the act provides that the Interstate Commerce Commission shall provide a standard height for drawbars, "and after July 1, 1895 no cars, either loaded or unloaded, shall

be used in interstate commerce which do not comply with the standard above provided for."

In October, 1910, the Interstate Commerce Commission made an order relative to drawbars, stating the maximum and minimum height thirty-four and one-half inches and thirty-one and one-half inches.

Section 8 of the original act provided that any employee of any such common carrier who may be injured

"by any locomotive, car or train in use contrary to the provision of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

The Federal Employer's Liability Act, which applies here, as both parties were engaged in interstate commerce, provides:

Section 3: "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such

96 common carrier or any statute enacted for the safety of employees contributed to the injury or death of such employee."

Defendant's counsel contends that the discussion of the United States Supreme Court in the case of St. Louis & San Francisco Railroad Company vs. Conarty, Administrator, 238 U. S., 243, lays down a rule of law interpreting the statute which releases the defendant from liability in this case.

In the Conarty case an employee of a railroad not endeavoring or intending to couple a car having defective couplers, or to handle it in any way; was riding on a foot-board of an engine which collided with it, and was killed in the collision.

It was held that the employee was not in a position where the absence of a coupler and drawbar prescribed by the Safety Appliance Act of Congress operated as a breach of duty imposed by that act for his benefit; that the evil against which the coupler provisions of the Safety Appliance Act are directed are those which appended the old-fashioned link and pin coupler where it was necessary for men to go between the ends of cars to couple and uncouple them, and was not enacted to provide a place of safety between colliding cars. It is urged by defendant's counsel in this case that it was not intended in the switching operations carried on at the time plaintiff's intestate was killed to couple onto the crippled car, and therefore within the rule laid down in the Conarty

Case the defendant cannot be held liable. It is doubtful whether a United States Supreme Court ever intended to go as far as the expressions of the opinion in the Conarty case might indicate. As to the Conarty Case we think it may be said that the United States Supreme Court in the later case of the Louisville & Nashville Rail-

road vs. Layton, 243 U. S. 617, has restated the rule of law,
97 which is to govern in these cases. The rule laid down in
this later case is summarized in the head note as follows:

"Under the Federal Safety Appliance Acts carriers in interstate commerce are liable in damages to their employees injured in the discharge of duty, whenever the failure to comply with those acts is approximate cause of injury and without reference to the physical position occupied by the employee, or the nature of the work upon which he is engaged, at the time when the injury occurs."

In that case the Court upheld a recovery where failure of couplers to work automatically in a switching operation resulted in a collision of cars from one of which the plaintiff was thrown to his injury while preparing to release brakes. There the brakeman injured was on a standing train, which was struck by other cars kicked against it owing to the failure of a defective coupler to operate and couple onto a switching engine. Was the absence of a coupler on the standing car in this case the proximate cause of the accident to plaintiff's intestate. We think this question must be answered in the affirmative. Had there been proper couplers and bumpers on the standing car the two cars could not have come into immediate contact so as to have crushed the brakeman on the moving car. It seems to us the statute was enacted to prevent just such things happening, which every one must know are liable to happen when couplers are defective even though those moving cars intended stopping before the cars came into actual contact. That the rule laid down in the Layton case rather than that indicated in the
98 Conarty case should prevail is emphasized by the decision of the same court in the Gotshall case, 244 U. S., 66, where the intestate brakeman was proceeding along the tops of the cars toward the locomotive when the train started because of the opening of a coupler on one of the cars, resulting in an automatic setting of emergency brakes and a sudden jerk which threw the brakeman off the train and under the wheels.

Holding as we did at the trial and now again upon a review of our rulings that the statute in question applies, and as the liability imposed by the statute is an absolute one.

St. Louis Iron Mountain & Southern Railway Co. v. Taylor,
210 U. S., 281.

Chicago, Burlington & Quincy Railway Co. v. United States,
220 U. S., 559.

Texas & Pacific Ry. Co. v. Regsby, 241 U. S., 33.

Minneapolis & St. Louis Rd. Co. v. Gotschall, 244 U. S. 66.

We think the crippled car while it stood on the siding at Silver Creek must be deemed to have been in use within the meaning of

the statute. It was there for the purpose of being unloaded, on a track where the evidence shows cars were daily being moved back and forth.

The Supreme Court of the United States has held that a carrier is not relieved from liability under the statute even where the defective car is being hauled to the nearest available point for repairs.

Great Northern Ry. Co. v. Otos, — U. S., 349.

Where such is the holding it would be idle to contend we think, that a car placed on a switch to be unloaded was not still in use within the meaning of the act. The trial court had no alternative but to instruct the jury, as it did, that the defendant's liability had been established and it only remained for them to assess the damages.

It is contended the verdict is excessive. It certainly seems large, but I am not disposed to disturb it, especially as this case will beyond doubt be appealed. If the Appellate Division should be of the opinion the verdict is too large that court may reduce the amount to such sum as it thinks right.

The defendant's motion for a new trial should be denied.

Order Settling Case.

The foregoing case containing all the evidence taken, and proceedings had upon the trial of this action, is hereby settled by me, as above set forth and ordered filed in the Erie County Clerk's office.

Dated, November 4th, 1918.

CHARLES B. WHEELER,
Justice Supreme Court.

Order of Affirmance.

At a Term of the Appellate Division of the Supreme Court of the State of New York Held in and for the Fourth Judicial Department in the City of Rochester, N. Y., Commencing on the 7th Day of January, 1919.

Present:

Hon. Frederick W. Kruse, Justice Presiding.
Hon. Nathaniel Foote, Hon. John S. Lambert, Hon. Pascal C. J. De Angelis, Hon. Irving C. Hubb, Associate Justices.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff-Respondent,

vs.

NEW YORK CENTRAL RAILROAD COMPANY, Defendant-Appellant.

The above named New York Central Railroad Company, defendant in this action, having appealed to the Appellate Division,

Supreme Court, Fourth Department, from a judgment of the Supreme Court entered in the office of the Clerk of the County of Erie on the 12th day of June, 1918, and from an order denying defendant's motion for a new trial entered in said clerk's office on the 23d day of October, 1918, and said appeal having been argued by Mr. H. W. Huntington of counsel for appellant, by Mr. Hamilton Ward of Counsel for respondent, and due deliberation having been had thereon, it is hereby

Ordered, that the judgment and order so appealed from be and the same hereby are affirmed with costs.

All concur except Foote, J. who dissents and votes for reversal upon the authority of St. Louis & San Francisco R. R. Co. v. Conarty, 2338 U. S. 243.

Entered 5th day of March, 1919.

NEWELL C. FULTON,

Clerk.

Enter.

FREDERICK W. KRUSE.

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Judgment of Affirmance.

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff-Respondent,

vs.

NEW YORK CENTRAL RAILROAD COMPANY, Defendant-Appellant.

The appeal taken by the defendant New York Central Railroad Company from a judgment entered in the office of the Clerk of the County of Erie on the 12th day of June 1918 and from an order denying defendant's motion for a new trial entered in said Clerk's office on the 23d day of October, 1918, having been brought on for a hearing at the Appellate Division, Supreme Court, Fourth Department in the City of Rochester, N. Y. at a term of said Court commencing on the 7th day of January, 1919, and an order of said Appellate Division having been thereafter and on the 5th day of March, 1919, made and entered affirming said judgment against the said defendant New York Central Railroad Company, with costs of said appeal to the plaintiff respondent herein, and all of the judges concurring therein except Foote J..

Now, on motion of Julius A. Schreiber, attorney for respondent, it is hereby

103 Adjudged, that the said judgment against said New York Central Railroad Company be and the same is hereby in all respects affirmed, and that the plaintiff-respondent recover of the appellant New York Central Railroad Company the sum of \$90.40 costs

and disbursements, and that she have execution against said defendant New York Central Railroad Company therefor.

Judgment signed this 12 day of March 1919.

EDWARD J. CLARK, *Spc. Dep. Clerk.*

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Notice of Appeal to Court of Appeals.

STATE OF NEW YORK:

Supreme Court, Appellate Division, Fourth Department.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits
of Oscar C. Lang, Decesed, Plaintiff-Respondent,
against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant-Appellant.

SIRS:

Please take notice, that the defendant, the New York Central Railroad Company, in the above entitled action hereby appeals to the Court of Appeals upon the judgment of the Appellate Division of the Supreme Court, Fourth Department, entered in the office of the Clerk of Erie County on the 8th day of March, 1919, which judgment affirmed with \$90.40 costs the judgment entered in the office of the Clerk of Erie County, in the above entitled action, on the 12th day of June, 1918, in favor of the above named plaintiff and against the above named defendant, for the sum of \$18,000.00 damages and \$70.83 costs, and which said judgment of the Appellate Division also affirmed the order entered in Erie County Clerk's office, on the 23rd day of October, 1918, which order denied defendant's motion for a new trial; and you will also

105 Please take notice, that the above named defendant, The New York Central Railroad Company hereby appeals to the Court of Appeals from an order of the Appellate Division of the Supreme Court, Fourth Department, entered in the office of the Clerk of the said Appellate Division, March 5th, 1919, and entered in the office of the Clerk of Erie County on the 8th day of March, 1919, which ordered and adjudged that the judgment and order in this action theretofore appealed from be affirmed with \$90.40 costs of the appeal, and the defendant hereby appeals from the whole and each and every part of said judgment, and from the whole and each and every part of said order.

Yours, etc.,

LOCKE, BABCOCK, SPRATT &
HOLLISTER,

Attorneys for Defendant.

Office & P. O. Address, 810-826 Fidelity Bldg., Buffalo, New York.

To Julius A. Schreiber, Esq., Attorney for Plaintiff, and to the Clerk of the County of Erie.

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Affidavit of No Opinion.

STATE OF NEW YORK:

Court of Appeals.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits
of OSCAR C. LANG, Deceased, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
County of Erie, m:

Percy R. Smith, being duly sworn, says that he is an attorney associated with Locke, Babcock, Spratt & Hollister, attorneys for the defendant-appellant herein; that no opinion was written by the Appellate Division, when the said Court affirmed the judgment of the Supreme Court herein, as deponent is informed and verily believes.

PERCY R. SMITH.

Sworn to before me this 10th day of July, 1919.

J. E. KELLY,
Notary Public, Erie Co., N. Y.

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Stipulation.

State of New York, Court of Appeals.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits
of OSCAR C. LANG, Deceased, Plaintiff,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

It is hereby stipulated, by and between the attorneys for the respective parties herein that the foregoing copies of the remittitur, judgment and notice of appeal to the Court of Appeals and all other papers and documents in said case contained are true and correct transcripts of and from the originals now on file in the office of the Clerk of Erie County and in the office of the Clerk of the Appellate Division, Fourth Department, and that the same may stand upon this appeal with the same force and effect as if certified by the Clerk of said county, or of said Appellate Division, and

It is further stipulated, that any exhibits herein, whether in the record and made a part hereof or not, may be produced and used

108 upon the argument of this appeal with the same force and effect as if printed and set forth in the printed case on appeal.

Dated, Buffalo, N. Y., July 10, 1919.

JULIUS A. SCHREIBER,

Attorney for Respondent.

LOCKE, BABCOCK, SPRATT &
HOLLISTER,

Attorneys for Appellant.

Opinion of Judge Andrews.

ANNA E. LANG, as Administratrix, etc., Respondent,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

(Decided January 6, 1920).

Appeal from a judgment of the Appellate Division affirming a judgment of the Trial Term entered upon the verdict of a jury in favor of the plaintiff.

Maurice C. Spratt for appellant.

Hamilton Ward for respondent.

ANDREWS, J.:

Where disregard of the Safety Appliance Act causes loss to one of the class for whose special benefit it was enacted his right 109 to recover damages is implied. (*Texas & Pacific Railway Company v. Rigsby*, 241 U. S. 33.) Not so, as to others.

In *St. Louis & San Francisco Railroad Company v. Conarty*, (238 U. S. 243) a switch engine collided with a freight car having no coupler or drawbar. The switch engine was not to handle this car but was on its way to a point some distance beyond it. Conarty, standing on the foot-board of the engine, was killed by the collision. There was evidence that had the coupler and drawbar been present the engine and the car would have been held so far apart as to have prevented the injury.

The Supreme Court said that section 2 of the act was intended to provide against the risk of coupling and uncoupling and to obviate the necessity of men going between the ends of the cars. It was not intended to provide a place of safety between colliding cars. Therefore, when a collision was not the proximate result of the violation of these regulations, where there was no endeavor to couple or uncouple a car or to handle it in any way, there can be no recovery under the act. The absence of a coupler and drawbar was not a breach of duty toward a servant in that situation.

If, however, a collision was proximately caused by the failure of the railroad to obey the statute, it was not intended to hold that only 110 those servants actually engaged in coupling or uncoupling cars could recover for the resulting injuries. Any servant so injured equally comes within the protection of the statute.

(Louisville & Nashville Railroad Company v. Layton, 243 U. S., 617; Minn. & St. Louis R. R. Co. v. Gotschall, 244 U. S. 66.)

In the case before us the defendant was engaged in interstate commerce. A car without drawbar or coupler was standing on the siding. The plaintiff's intestate was a brakeman and was riding on a second car kicked upon the same siding. A collision occurred and the deceased was crushed between the car upon which he was riding and the defective car. As in the Conarty case, it was plain that had the coupler and drawbar been present the two cars would have been held so far apart that he would have escaped uninjured. There was no attempt to couple on to the defective car or to handle it in any way.

Under these circumstances Mr. Lang was not one of the persons for whose benefit the Safety Appliance Act was passed. The collision was not the proximate result of the absence of the coupler and drawbar. Their presence was not required so that they might act as bumpers.

It is said that had the car not been defective the work on hand would have been done in a different way. Assuming that this is so, still the collision was not the proximate result of the defect.

The judgments of the Trial Term and of the Appellate Division must be reversed and the complaint dismissed, with costs in all courts.

111 Hiscock, Ch. J., Collin, Hogan and McLaughlin, JJ., concur; Chase and Crane, JJ., dissent.

Judgments reversed, etc.

Remittitur.

STATE OF NEW YORK, ss:

Court of Appeals.

Pleas in the Court of Appeals, Held at the Court of Appeals Hall, in the City of Albany, on the 6th Day of January, in the Year of Our Lord One Thousand Nine Hundred and Twenty, Before the Judges of Said Court.

Witness: The Hon. Frank H. Hiscock, Chief Judge, Presiding.
R. M. BARBER, Clerk.
Remittitur January 7th, 1920.

ANNA E. LANG, as Admx., etc., Respondent,
against

THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

Be it Remembered, that on the 30th day of August, in the year of our Lord one thousand nine hundred and nineteen, The
112 New York Central Railroad Company, the appellant in this cause, came here into the Court of Appeals, by Locke, Bab-
10—290

cock, Spratt & Hollister, its attorneys and filed in the said court a notice of appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department.

And Anna E. Lang, as Admrx., etc., the respondent in said cause, afterward appeared in said Court of Appeals by Julius A. Schreiber, her attorney.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Maurice C. Spratt, of counsel for the appellant, and by Mr. Hamilton Ward, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments herein be and the same hereby are reversed and complaint dismissed, with costs in all courts.

And it was also further ordered that the record aforesaid, and the proceedings in this court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said Judgments be reversed and complaint dismissed, with costs in all courts as aforesaid.

113 And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the justices thereof, etc.

R. M. BARBER,
*Clerk of the Court of Appeals
of the State of New York.*

Albany, January 7th, 1920.

COURT OF APPEALS, CLERK'S OFFICE, *ss.*:

I Hereby Certify that the preceding record contains a correct transcript of the proceedings had in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.]

R. M. BARBER,
Clerk.

114

Order.

At a Special Term of the Supreme Court, Held in and for the County of Erie, at the City and County Hall in the City of Buffalo on the 19th Day of January, 1920.

Present:

Hon. Philip A. Laing, Justice Presiding.

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff-Respondent,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant-Appellant.

The above named defendant having appealed to the Court of Appeals of the State of New York from a judgment of the Appellate Division of the Supreme Court, Fourth Department, entered and filed in the office of the Clerk of Erie County on the 9th day of March, 1919, whereby it was adjudged that the judgment of the Supreme Court of Erie County entered in this action on the 12th day of June, 1918, in favor of the plaintiff for \$18,670.82 be affirmed, and further adjudged that the plaintiff recover of the defendant the sum of \$800.10 costs and the said appeal having been duly submitted before the Court of Appeals and after due deliberation the Court of Appeals having ordered and adjudged that the judgments appealed from be reversed and the complaint dismissed, with costs in all courts, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court there to be proceeded upon according to law.

Now, on reading and filing the remittitur from the Court of Appeals herein and upon motion of Locke, Bullock, Spurr & Hollister, attorneys for the defendant-appellant, it is

Ordered, that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court.

PHILIP A. LAING,
Judge of the Supreme Court.

Granted Jan. 19, 1920.

G. V. LAUGHLIN,
Sp. Dep. Clerk.

116

Judgment.

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits
of Oscar C. Lang, Deceased, Plaintiff-Respondent,
vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant-
Appellant.

A judgment in this action in favor of the plaintiff and against the defendant having been rendered in this court on the 12th day of June, 1918, for the sum of \$18,070.83 and the defendant having appealed from said judgment to the Appellate Division, Fourth Department, and the said judgment having been affirmed in all things by this court and the judgment of affirmance having been entered thereon on the 8th day of March, 1919, which judgment directed that the plaintiff recover of the defendant the sum of \$90.40 costs of said appeal, and the defendant having appealed therefrom and the said Court of Appeals having sent hither its remittitur filed herein the 16th day of January, 1920, by which it appears that the said Court of Appeals has reversed the judgment appealed from and dismissed the complaint, with costs in all courts, and has given judgment accordingly and has remitted the judgment of said

Court of Appeals to this court to be enforced according
117 to law, and this court having by an order duly entered herein
on the 16th day of January, 1920, ordered that said judgment be made the judgment of this court and the defendant's costs having been duly taxed at the sum of \$285.13.

Now, on motion of Locke, Babcock, Spratt & Hollister, attorneys for the defendant herein, it is

Adjudged, that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court and that the defendant recover of the plaintiff the sum of \$285.31 and have execution therefor.

Judgment signed this 19th day of January, 1920.

EDWARD J. CLARK,

Deputy Clerk.

118 STATE OF NEW YORK,
County of Erie, ss:

I, John H. Meahl, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record, do hereby certify that I have compared the annexed copy of Remittitur, Order and Judgment on pages 111 to 117 with the original thereof, entered and on file in the office of the Clerk of Erie County, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said County and Courts at Buffalo, this 17th day of March, 1920.

No. 13091.

[SEAL.]

JOHN H. MEAHL,

Clerk.

118½ [Endorsed:] Filed Erie County Clerk's Office Jan. 19th
1920 at 11:00 A. M.

119 Supreme Court of the United States.

ANNA LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff in Error,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant in Error.

Whereas, the United States Supreme Court has directed a writ of certiorari, dated the 6th day of May 1920, to the judges of the Supreme Court of the State of New York demanding them to send the record and proceedings in said cause to the said Supreme Court, so that the same court may act thereon and on the application for said writ; and

Whereas, a certified transcript of the record on file in the office of the Clerk of said Supreme Court of the State of New York, was duly filed with the Clerk of the United States Supreme Court at Washington, D. C.

Now, therefore, it is stipulated by and between the counsel for the respective parties hereto that the certified transcript of the record now on file in the office of the Clerk of the United States — may be used as a return to the writ so granted as aforesaid, and the Clerk of the Supreme Court of the State of New York in and for the County of Erie is hereby authorized to return this stipulation in lieu of any further return to said writ.

Dated, Buffalo, N. Y., May 10, 1920.

HAMILTON WARD,

Attorney for Plaintiff in Error.

LOCKE, BABCOCK, SPRATT &

HOLLISTER,

Attorneys for Defendant in Error.

120 [Endorsed:] Supreme Court, County of Erie. Anna Lang.
as Administrator of the Goods, Chattels and Credits of Oscar
C. Lang, Deceased, Plaintiff in Error, vs. The New York Central
Railroad Company, Defendant in Error. Copy. Stipulation.
Hamilton Ward, Attorney at Law, Rooms 104-109 Erie County
Savings Bank Bldg., Buffalo, N. Y., Attorney for Plaintiff in Error.
Phone. Bell Seneca 503. Filed Erie County, Clerk's Office, May
20, 1920.

121 To the Honorable, the Supreme Court of the United States,
Greeting:

In obedience to the writ of certiorari hereto attached and returned herewith, I hereby certify that the foregoing contains a true copy of the stipulation of counsel in the case therein stated, as appears from the original now on file in this office.

Witness my hand and the seal of the Supreme Court hereto affixed this 20 day of May 1920.

[Seal of Supreme Court, County of Erie, N. Y.]

EDWARD J. CLARK,
Deputy Clerk of Supreme Court, Erie County, N. Y.

122 UNITED STATES OF AMERICA, *ss.*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Being informed that there is now pending before you a suit in which Anna E. Lang, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, deceased, is plaintiff, and The New York Central Railroad Company is defendant, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States. Do hereby
123 command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

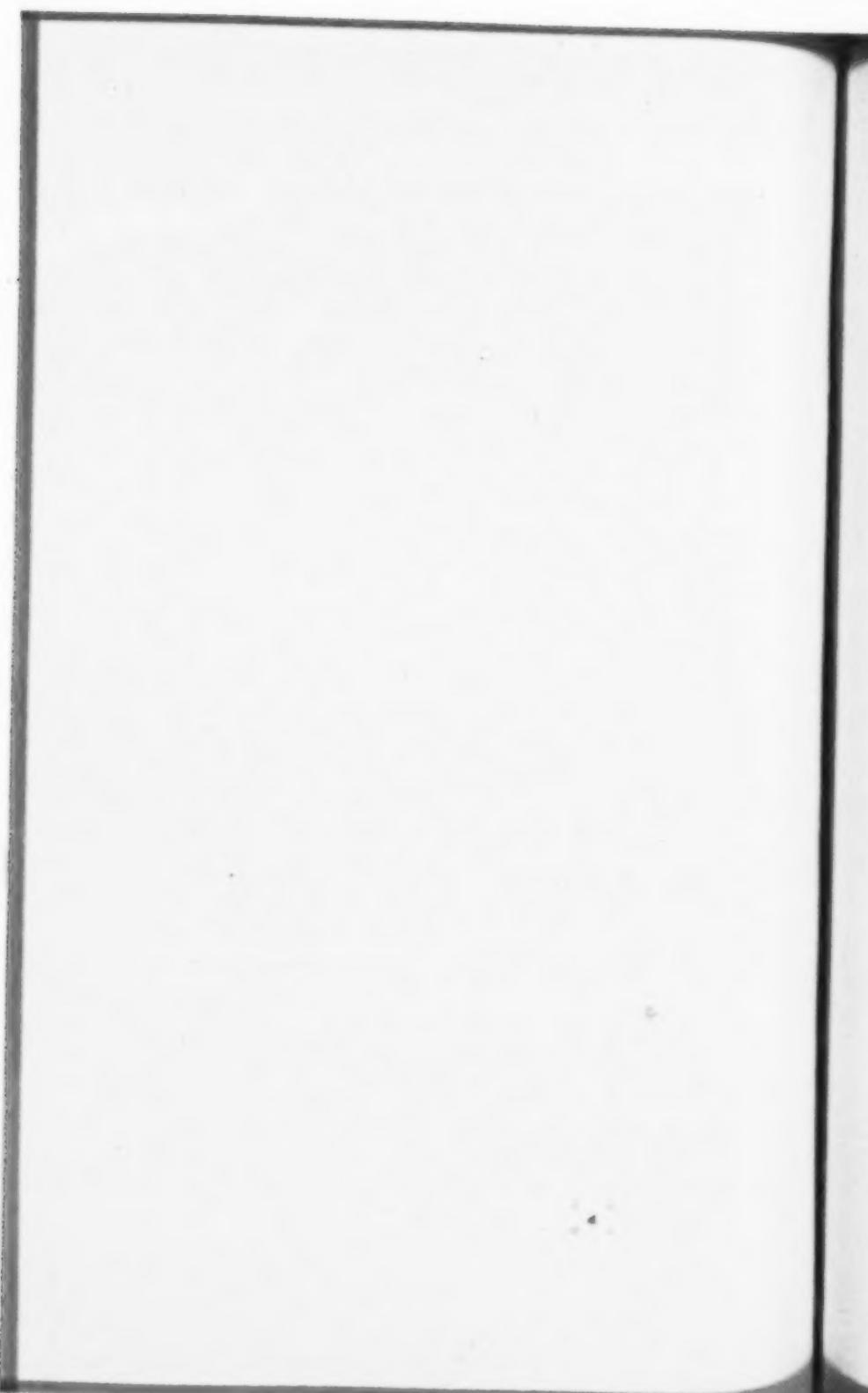
Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,572. Supreme Court of the United States, No. 817, October Term, 1919. Anna Lang, as Administratrix, etc., vs. New York Central Railroad Company. Writ of Certiorari.

124 [Endorsed:] File No. 27572. Supreme Court U. S., October Term, 1919. Term No. 817. Anna Lang, as Adm'x, &c., Petitioner, vs. N. Y. Central R. R. Co. Writ of certiorari and return. Filed May 22, 1920.





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DEC 1

JAMES D.

SUPREME COURT OF THE
UNITED STATES

October Term, 1920

ANNA LANG, as Administratrix
of the Goods, Chattels, and
Credits of OSCAR C. LANG, De-
ceased,

Petitioner,

versus

NEW YORK CENTRAL RAILROAD
COMPANY,

Respondent.

No. 290

Petition on Motion to Advance Case

The petition of Anna Lang respectfully shows as follows:

First: This case comes before this Honorable Court, pursuant to a writ of certiorari granted herein, to review a judgment of the Court of Appeals of the State of New York.

Second: Plaintiff's intestate was employed as a freight trainman on a way-freight train running east from Erie, Pa., to the City of Buffalo, N. Y., and was killed November 1, 1917, by being crushed between two cars, because one of them was defecti-

in that the automatic coupler was broken. Defendant at the time was engaged and intestate employed in interstate commerce when the accident occurred. At Silver Creek there was a car on the siding destined for Farnham which was to be taken from said siding into the train at Silver Creek and thence to its destination. On the siding at Silver Creek was another box car loaded with steel. It was standing with several other cars on the siding next to the car about to be taken on to the train and moved to Farnham. This car was partially unloaded. The consignee had been unable to complete the unloading of the car and it was on said siding while the unloading was proceeding. The draw bar, draft timber and coupling apparatus on the west end of the car as it stood at the time of the accident were gone. The car for Farnham was on what is known as the house track siding and the defective car stood east of it. The train came into the station and stopped on No. 1 track. Owing to the fact that the coupler on the out of order car was broken down on the westerly end, the Farnham car could not be pulled out in the usual way by backing the engine on to the siding from the east and pulling out the cars, including the out of order car and the Farnham car next west, so it was determined to detach the engine and move it by another siding to the westerly end of the switch from which the Farnham and out of order car stood and pull the Farnham car therefrom to the west and attach it to the train. In order to do this it was necessary to pull

out five other cars which stood next to and west of the Farnham car on the same siding. Of these six the Farnham car was put on the train, two left on another siding and the remaining three were connected back on to the siding from which they were taken next to the out of order car. When they were connected back, intestate climbed upon the end of the car farthest in to operate the brakes which was the usual and proper thing to do. With proper equipment in the way of coupling, the car upon which intestate was working would not have come in close contact with the out of order car as there would have been a space of about two feet, but with the couplers off the contact was complete. It was the duty of intestate to so operate the brakes, if he could, to stop the three cars right next to the out of order car. In operating the brakes intestate was compelled to stand upon the steps at the end, and somewhat below the top of the car. For some reason, presumably because he was unable to stop the three cars in time with the brakes, there was a complete and violent contact and the leg of intestate was crushed which resulted in his death.

Third: In view of the fact that there is a conflict between the law as expounded by the Court of Appeals, the United States Circuit Court of Appeals, and the United States Supreme Court, and because there is manifest confusion as to the interpretation of the Conarty, Layton and Gotschall cases, and that similar cases are constantly arising, not only in the

Federal court but also in the State courts, it is respectfully submitted that an early decision should be made in the case at bar and the law settled as soon as possible in the interest of railroad employers and employees, and for the guidance of the lower courts.

Fourth: The attorneys for the respondent join in this petition.

WHEREFORE, your petitioner respectfully prays that this Honorable Court will grant her motion to advance this case on the calendar of this Honorable Court because of the general importance and public interest in the question involved, and that, if possible, the case be advanced upon the calendar of this court.

Dated Nov. 1, 1920.

JULIUS A. SCHRIEBER,
Attorney for Petitioner,

Office and P.O. Address,
104 Erie County Bank Bldg.,
Buffalo, N. Y.

HAMILTON WARD,
Of Counsel.